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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1904~~ 1905.

No. ~~539~~ 180.

EDWARD B. WHITNEY, AS TRUSTEE IN BANKRUPTCY OF DRESSER & CO., APPELLANT,

vs.

EMMA B. DRESSER.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED FEBRUARY 17, 1905.

(19,632.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 21, 1905.

	Market value.
991 shares of the capital stock of the American Brass Company	$138,740
370 shares of the capital stock of the New England Watch Company	13,875
87 shares of the capital stock of the American Pin Company	3,915
Total	$156,530

3 Deponent is informed and believes that said securities were deposited as collateral for loans, the proceeds of which loans were turned over to the firm of Dresser & Co., composed of the now bankrupts Daniel Le Roy Dresser and Charles E. Reiss, and used by said firm.

That no part of said debt has been paid, and that there are no setoffs or counterclaims thereto; except that should there be any equity remaining after the sale of such of said securities as are deposited as collateral for said loans, then the claim of deponent will be reduced by the amount of such equity. That no note has been received for said debt, no judgment has been rendered thereon, and deponent has not, nor has any person by her order, had or received any manner of security for said debt whatever.

EMMA B. DRESSER, Creditor.

Subscribed and sworn to before me this 22d day of August, 1903.

WALTER HAROLD CONERT,
[SEAL.] A Notary Public in and for the Province of Nova Scotia.

(Endorsed:) Proof of debt of Mrs. E. B. Dresser for $156,530.

4 District Court of the United States for the Southern District of New York.

In the Matter of DANIEL LE ROY DRESSER and CHARLES E. REISS, Individually and as Members of the Firm of Dresser & Co., Bankrupts.

At the city, county and State of New York, on the 29th day of February, 1904, came Emma B. Dresser and made oath and says: That Daniel Le Roy Dresser and Charles E. Reiss, composing the firm of Dresser & Co., persons against whom a petition for adjudication in bankruptcy has been filed, at and before the filing of said petition were and still are justly and truly indebted to said deponent in the sum of $88,145; that the consideration of said debt is as follows:

Prior to May, 1896, at the request of the now bankrupt, D. Le Roy Dresser, and of E. Reid Goodrich copartners, composing the firm of Dresser & Goodrich, deponent loaned to said firm of Dresser & Goodrich, for the purpose of borrowing money thereon by said firm (or for other purposes), the following securities, all of which said firm of Dresser & Goodrich promised to return to deponent:

822 shares of the capital stock of the American Brass Company (par value $1 per share) at 135 per share.

240 shares of the capital stock of the New England Watch Company (par value $25 per share) at $32 per share.

5 70 shares of the capital stock of the American Pin Company (par value $25 per share) at $40 per share.

Deponent is informed and believes that said securities were deposited by said firm of Dresser & Goodrich as collateral for loans, the proceeds of which loans were turned over to and used by said firm.

That in or about May, 1896, said firm of Dresser & Goodrich was dissolved, the now bankrupt Daniel Le Roy Dresser succeeding to the business of said firm, taking over all its assets and assuming all its liabilities, including deponent's claim against said firm.

That at the request of said Daniel Le Roy Dresser, and with deponent's knowledge and consent, the liability of said firm of Dresser & Goodrich for a return of said securities to deponent was assumed by said Daniel Le Roy Dresser, and the proceeds of the loans for which said securities had been deposited by said firm as collateral were turned over to said Daniel Le Roy Dresser and used by him in his business.

That in or about May, 1897, a copartnership was formed between the now bankrupts, Daniel Le Roy Dresser and Charles E. Reiss, under the firm name of Dresser & Co., said partnership succeeding to the said business of said Daniel Le Roy Dresser, taking over all his assets and assuming all his liabilities, including deponent's said claim against him.

That at the request of said Daniel Le Roy Dresser and Charles E. Reiss, composing the firm of Dresser & Co., and with deponent's knowledge and consent, the liability of said Daniel Le Roy Dresser for a return of said securities to deponent was assumed by said Daniel Le Roy Dresser and said Charles E. Reiss, composing the firm of Dresser & Co., and used by said firm in its business.

6 That, as deponent is informed and believes, the values of said securities on the 7th day of March, 1903, were as follows:

Shares of the capital stock of the American Brass Company (par value $100), $135 per share.

Shares of the capital stock of the New England Watch Company (par value $25), $32 per share.

Shares of the capital stock of the American Pin Company, (par value $25), $40 per share.

That the amounts of the loans for which the securities of deponent were deposited as collateral are as follows:

Creditor.	Amount.	Security.
United States Mortgage and Trust Company.....	$25,000	51 shares of American Brass Company stock.
American Exchange National Bank.....	67,500	28 shares American Brass Company stock. 240 shares New England Watch Company stock. 70 shares American Pin Company stock.
Coe Brass Company.....	30,000	300 shares American Brass Company stock.
Dime Savings Bank of Waterbury, Conn.....	37,000	443 shares American Brass Company stock.

The securities of deponent deposited as collateral for the loans of the Coe Brass Company and of the Dime Savings Bank of Waterbury, Conn., constitutes the only security for said loans, and the value of said shares on March 7, 1903, exceeded and now exceeds the amount of said loans. Deponent's claim, therefore, for the value of the securities deposited as collateral for the loans of the Coe Brass Company and of the Dime Savings Bank of Waterbury, Conn., should be reduced by the amount of equity in said loans existing on March 7, 1904, thus fixing the indebtedness of said bankrupts to deponent on 743 shares of American Brass Company stock at an amount equal to the sum of both loans, to wit, $67,000.

7 Deponent is informed and believes that the amounts due from said bankrupts to the United States Mortgage and Trust Company and to the American Exchange national bank each exceed the value of the security deposited as collateral therefor, and deponent therefore claims for the market value of said securities on March 7, 1903, the date of the filing of the petition herein, as follows:

79 shares American Brass Company stock at $135...	$10,665 00
240 shares New England Watch Company stock, at $32..	7,680 00
79 shares American Pin Company stock at $40.....	2,800 00
	$21,145 00

That no part of said debt has been paid, and that there are no setoffs or counterclaims thereto; that no note has been received for said debt, no judgment has been rendered thereon, and deponent has not, nor has any person by her order, had or received any manner of security for said debt whatever.

EMMA B. DRESSER, Creditor.

Subscribed and sworn to before me this 29th day of February, 1904.

WILLIAM H. WILSON, JR.,
[SEAL.] Notary Public, Kings County.

Certificate filed in New York county.

(Endorsed:) Amended proof of claim.—Filed March 3, 1904.

8 In the District Court of the United States for the Southern District of New York.

In the Matter of DANIEL LE ROY DRESSER and CHARLES E. REISS, Individually and as Members of the Firm of Dresser & Co., Bankrupts. In Bankruptcy. No. 5728.

To Hon. Stanley Walker Dexter, referee in bankruptcy.

Your petitioner respectfully shows:

That he is the trustee of the bankrupts above named, that he duly qualified as such on the 29th day of September, 1903, and since that date has been acting as such trustee.

That the proof of debt of Emma B. Dresser, claiming to be a creditor of the firm of Dresser & Co., was filed herein on the 26th day of August, 1903, and, upon oral and written objections made thereto by certain creditors, was held for further proof and argument.

That the same should not be allowed for the following reasons:

I. That it appears upon the face of the proof of debt submitted by the said Emma B. Dresser, that the securities therein alleged to have been loaned by her to the bankrupt Daniel Le Roy Dresser,
9 were loaned to said bankrupt individually and not to him as a member of the firm of Dresser & Co., or to said firm, and that therefore the said Emma B. Dresser is not entitled to recover the value of said securities or any part thereof from said firm of Dresser & Co., nor to prove the same as a debt against the estate of said firm, nor to participate in the dividends paid from the assets of said firm to the creditors thereof, and that she is not a creditor of the firm of Dresser & Co., as appears upon the face of her proof of debt as aforesaid.

II. That the said alleged debt proved by said Emma B. Dresser as aforesaid is unliquidated in amount, in that certain offsets and counterclaims are set forth in the proof thereof, to wit, certain equities, claimed by said creditor, the values whereof are not stated and are unknown, and that until the values of said equities are ascertained and deducted from the amount of said debt, the same cannot be liquidated as to amount and proved in bankruptcy.

III. That if the said Emma B. Dresser is a creditor of the firm of Dresser & Co. for any amount whatever, it is only to the extent of the moneys actually received by said firm as the proceeds of the

loans against which the securities, set forth in her proof of debt, are therein alleged to have been pledged; that the said proof of debt does not state the amount of said loans, or any of them; and that therefore the said debt therein alleged and sought to be proved cannot be liquidated in amount and proved in bankruptcy.

IV. Upon information and belief that the value of the securities set forth in said proof of debt are in excess of their actual values; that the said securities are unlisted stocks in private manufacturing corporations whose values are at the best problematical and difficult to determine, and that the facts upon which the alleged values are based should be set forth so that the actual values of said securities may be ascertained in the interest of the estate of the bankrupts and of the creditors thereof.

V. That the securities alleged, in said claim, as having been loaned by Emma B. Dresser to Daniel Le Roy Dresser, and which constitute the subject matter of said claim, were loaned to Daniel Le Roy Dresser individually and not to the firm of Dresser & Co., and that said Emma B. Dresser is, therefore, not entitled to prove said claim against the said firm of Dresser & Co., nor to participate in the distribution of the assets thereof until all of the creditors of said firm have been first paid in full.

That the attorneys of said Emma B. Dresser are Messrs. Butler, Notman, Joline & Mynderse, of No. 54 Wall street, in the borough of Manhattan, city of New York.

Wherefore, your petitioner prays that said proof of debt may be rejected.

EDWARD B. WHITNEY, Petitioner.

SOUTHERN DISTRICT OF NEW YORK,
State of New York, City and County of New York, } ss:

I, Edward B. Whitney, the petitioner mentioned and described in the foregoing petition, do hereby make solemn oath that the statements of fact therein contained are true according to the best of my knowledge, information and belief.

EDWARD B. WHITNEY.

Subscribed and sworn to before me this 21st day of January, 1904.

[SEAL.] EDWARD D. FIRTH,
Notary Public (No. 87), Kings Co.

Certificate filed in New York Co.

11 NEW YORK, March 7, 1904.

Before Stanley W. Dexter, Referee in Bankruptcy.

Appearances.

Messrs. Butler, Notman, Joline & Mynderse (by Mr. Larkin and Mr. Hargrave), for claimant.
George H. Gilman, Esq., for the trustee.

Hearing on Claim of Emma B. Dresser.

CARL G. RASMUS, called and sworn as a witness on behalf of the trustee, testified as follows:

Direct-examination by Mr. GILMAN:

Q. What is your occupation?
A. I am assistant treasurer of the United States Mortgage and Trust Company.
Q. Did you have a transaction with Mr. Dresser, in consequence of which certain stock of the American Brass Company was put up as collateral to a loan?
A. We did, sir.
Q. Will you state what the transaction was?
A. A loan was made to Mr. Dresser for $25,000, secured by 250 shares of Trust Company of the Republic stock and 51 shares of American Brass Company's stock.
Q. When was the loan made?
A. It was renewed the last time, February 3d, 1903.
Q. Can you state when it was first made?
A. Not very accurately, probably six months before that.
Q. Have you the original note here?
A. I haven't the original, but I have a copy of it, and I have a letter from Messrs. Rollins & Rollins, in which they acknowl-
12 edge receipt of the original note. Their man has charge of that, and he is out of town, and his papers are not accessible to-day. Here is a copy of the note.

Mr. LARKIN: We do not object to a copy.

Q. Will you furnish a copy to be put in the evidence?
A. This is a copy.
Q. May we have it?
A. Yes.

Mr. GILMAN: I offer the copy of the note in evidence:

The note referred to was dated February 13, 1903, for $25,000, and it was marked "Emma C. Dresser Claim, Exhibit No. 1, March 7, 1904."

Cross-examination by Mr. LARKIN:

Q. Are you familiar with the form of the prior note of which this note is the last of the series?
A. The notes are all the same.
Q. I ask you if you are familiar with them?
A. Yes, sir.
Q. In each case they were signed by D. Le Roy Dresser?
A. Yes, sir; D. Le Roy Dresser.
Q. When was the first of these notes made?
A. I should think somewhere about six months previous to February, 1903; may have been more, may have been less.
Q. Then there was only one extension?
A. I think they were made for three months and renewed for three months.
Q. One renewal only?
A. This was the second renewal of the original note.
Q. You don't know anything about the application of the funds resulting from this loan, do you?
A. No.
13 Q. Have you examined the check that was given by your company?
A. No.
Q. Could you find that check?
A. I think we could.
Q. Will you send me a copy of it, please?
A. Yes.

Stipulated that the signature of the witness be waived.

IRVING J. KNOX, called, testifies as follows:

It is stipulated that the swearing of the witness be waived.

Direct examination by Mr. GILMAN:

Q. What is your occupation, Mr. Knox?
A. I am secretary of the Commonwealth Trust Company.
Q. And were you formerly connected with the Trust Company of the Republic?
A. Yes, sir; I was assistant secretary.
Q. Do you know anything of the transactions in which certain stock of the American Brass Company was put up in connection with the loan made by your company either to Mr. Dresser or Dresser & Company?
A. Yes, sir; I remember it.
Q. Can you state what the facts were in connection with that?
A. The loan was made on July 24th, I believe.
Q. What year?
A. 1902 by D. Le Roy Dresser on 300 shares of the American

rass Company's stock, and it was paid on October 13 of the same ear.

Q. Do you know who paid it?

A. That I don't know. Our records show that a loan was made n that day.

Q. Do you know to whom these 300 shares of stock were delivered, do your records show that?

A. No, sir; our records show that the loan was paid on that date, and the stock was surrendered.

Mr. LARKIN: We will admit that the loan was taken by the Coe rass Company.

Cross-examination by Mr. LARKIN:

Q. Do you know personally of the fact that you have testified to?

A. I know by examination of the records.

Q. The records show that the note was made by D. Le Roy Dresser s an individual?

A. Yes, sir.

Q. How does the record read?

A. The record reads that the loan was made on that date to D. e Roy Dresser.

Q. Do you remember what date that was the note was made?

A. July 24, 1902, I believe.

Q. Do you know anything about the application of money that ou loaned to Mr. Dresser on this stock?

A. I know that we gave him three checks for $10,000 each.

Q. Now have you got the checks?

A. No, sir; I haven't got them in my possession.

Q. Do you know where they are?

A. Yes, sir.

Q. Will you send me copies of them?

A, Yes, sir.

Q. What sort of note was this, ordinarily cut-throat demand note?

A. Yes, sir.

Q. Grab everything in sight until paid?

A. Yes, sir.

It is stipulated that the signature of the witness to this testimony e waived.

OTIS S. NORTHROP, called as a witness, testified as follows:

Stipulated that the swearing of the witness be dispensed with.

Direct-examination by Mr. GILMAN:

Q. Mr. Northrop, what is your occupation?

A. Treasurer of the Dime savings bank.

Q. Do you know anything of the transaction with Mr. Dresser, of

the firm of Dresser & Company, under which some four hundred and forty-three shares of the American Brass Company's stock were pledged with the Dime savings bank as collateral to a loan, and if so, state what the transaction was?

A. The original note and loan was made before I was actively connected with the bank.

Q. Was the loan subsequently renewed?

A. Yes, sir; it was changed, because the collateral was changed.

Q. Tell us all you know about the transaction.

A. I think the stock that was originally pledged was that of the Benedict & Burnham Manufacturing Company and Holmes, Boothe & Hayden's, and they were taken over by the American Brass Company and the stock that we held was deposited and stock of the American Brass Company issued in exchange.

Q. What stock is now under the loan?

A. 443 shares of American Brass.

Q. Have you the note or other evidence of the loan with you?

A. Yes, I have the note.

Q. Will you produce it?

Witness does so.

Q. This is your regular printed form, isn't it?

A. Yes.

Q. You will be willing to let us have a copy of it?

A. Yes; I will mail you a copy.

Mr. GILMAN: I offer the original note in evidence.

It is consented that the witness furnish a copy of this note, and that the same be marked in evidence as Exhibit No. 2 of this date.

16 Q. Do you know to whom the amount of that loan was paid?

A. No, I do not.

Q. Would your records show to whom the check was paid?

A. I suppose I could find the old check.

Q. Will you look it up and find the check and send a copy of the check to me?

A. That is, to the referee?

Q. Well, send it to the referee.

A. All right. A copy of the check and endorsement on it?

Q. Yes.

A. Yes.

Cross-examination by Mr. LARKIN:

Q. Mr. Northrop, do you recall in whose name that stock stood originally when you made the loan?

A. Emma Burnham Dresser.

Q. You understand her to be the wife of Mr. Dresser—D. Le Roy Dresser?

A. Yes.

Q. Then, after the taking over of the Holmes, Boothe & Hayden, and the other subsidiary companies of the American Brass Company, the stock of the American Brass Company was substituted for Holmes, Boothe & Hayden's and other stock, was it not?

A. Yes.

Q. And the stock of the American Brass Company still stood in Mrs. Dresser's name, did it not?

A. I am not sure.

Q. And later it was transferred into the name of Daniel Le Roy Dresser?

A. Yes, sir.

Q. You don't know anything about the application of the proceeds of this loan, do you; you were not connected with the bank at the time?

A. No, I do not.

Mr. GILMAN: I rest.

Mr. LARKIN: I move to strike out the objections and allow the claim as filed. I move to allow the claim and strike out the objections on the ground there is no proof tending to show anything to disprove that the claim for the value of these securities is as her sworn proof of claim set forth; that all the testimony that has been introduced simply as a method, and they have offered absolutely nothing in opposition or to disprove the claim.

The REFEREE: I won't dismiss it. I do not think this of itself is sufficient to shift the burden of proof. You must connect it by further evidence, Mr. Gilman. You will have to offer further evidence or else I will have to sustain the claim.

Mr. GILMAN: I shall ask for an adjournment to consider the question. I am not sure whether I shall let the referee make his ruling and take a certificate or whether I shall bow to the ruling of the referee.

After further informal discussion it was agreed that the referee should make his ruling.

The REFEREE: I dismiss the objections and allow the claim.

Mr. GILMAN; I ask for a certificate.

The REFEREE: Is this claim liquidated, I am asking you now; how do you establish the equity. I understood you had agreed on that.

Mr. LARKIN: It is immaterial what the equity is because if it is above the amount of the debt all we do is to deduct it from the value of the securities which will leave the amount of the debt. In other words, our claim is for $67,000 in those two cases, and the amount we will be required to pay, which is the value of the securities less the equity. In other words, no matter what the equity is our claim

will always be for the same amount, $67,000, as long as there is an equity.

The REFEREE: Where there is no equity?

18 Mr. LARKIN: Where there is no equity we claim for the value of those securities on March 7th, the date of the filing of the petition, and Mr. Gilman, I thought, had agreed as to the value of those securities.

The REFEREE: If you haven't agreed you must introduce evidence as to the value of those securities.

It is consented that an affidavit be offered in lieu of witnesses to be called to prove the facts for the purpose of fixing the value of the securities in the claim.

Mr. LARKIN: I offer in evidence an affidavit of Robert F. Griggs, of Waterbury, Connecticut, as to the value of certain securities on March 7, 1903.

Received in evidence and marked "Claim of Emma B. Dresser, Ex. No. 3, March 7, 1904."

(Copy.)

$25,000.00. NEW YORK, Feb'y 13th, 1903.

Ninety days after date for value received, I promise to pay to the United States Mortgage and Trust Company, or order, at the office of said company in the city of New York, twenty-five thousand ^{00} dollars with interest at the rate of six per cent. per annum, having deposited with said company as collateral security for payment thereof, the following property, viz:

250 shares Trust Co. of the Republic
51 " American Brass Co.

which I hereby authorize said company on non-performance of any obligation herein contained, to sell in such manner as it may deem proper, without notice, either at any broker's board, or at any public or private sale, applying the proceeds to the payment of the principal and interest of this note after deducting all legal and other costs and expenses of collection, sale and delivery, and accounting

19 to the promissor for the surplus, if any. In case of deficiency after sale hereunder, the promissor agree- to pay the amount thereof, with legal interest.

In case of depreciation in the market value of the security held as collateral for this loan, a payment is to be made on account, or additional satisfactory securities pledged at the option of the said payee. In case of failure to do so, this note shall be deemed to be due and payable forthwith, anything herein before expressed to the contrary notwithstanding, and the payee may immediately sell the collateral as hereinbefore provided. It is understood and agreed that upon sale of collateral hereunder, the said payee may purchase

and hold for his own account, and not as a pledgee, any property offered at such sale. All collaterals herein mentioned and the proceeds thereof shall also be held and treated as collateral security, for any and all other debts or claims held against the promissor by said company, and which may be outstanding and unpaid at any time; and all other or further collateral securities which shall be either added to or substituted for the above, shall be subject to the same conditions and agreements.

(Signed) D. LE ROY DRESSER.

(On margin:) United States Mortgage and Trust Company.
(Endorsed:) Emma B Dresser Claim Ex. 1, M'ch 7/04.

20 District Court of the United States for the Southern District of New York.

In the Matter of DANIEL LEROY DRESSER and CHARLES E. REISS, Individually and as Members of the Firm of Dresser & Co., Bankrupts.

STATE OF CONNECTICUT, }
County of New Haven, } *ss:*

Robert F. Griggs, being duly sworn, says: That he is engaged in business as a stockbroker in the city of Waterbury, State of Connecticut, and that he is familiar with the market value of the securities of the American Brass Company, the New England Watch Company and the American Pin Company.

To the best of the deponent's knowledge the market value of such securities on March 7, 1903, was as follows: Shares of the capital stock of the American Brass Company (par value $100), $135 per share; shares of the capital stock of the New England Watch Company (par value $25), $32 per share; shares of the capital stock of the American Pin Company (par value $25), $40 per share.

That said market value is based upon sales of said securities on or about that date.

ROBERT F. GRIGGS.

Sworn to before me this first day of March, 1904.

CHAS. W. GILLETTE,
[SEAL.] Notary Public.

(Endorsed:) Affidavit, Exhibit No. 3.

21 District Court of the United States, Southern District of New York.

In the Matter of DRESSER & COMPANY, Bankrupt.

Claim of Emma B. Dresser.

It is agreed between the attorneys for the claimant and for the trustee,

That the paper annexed hereto and marked A is a copy of the note referred to in the testimony of Irving J. Knox as given to the Trust Company of the Republic, and that it was assigned to the Coe Brass Company and is now held by the latter company.

That the paper annexed hereto and marked B is a copy of the note referred to in the testimony of Otis S. Northop as given to the Dime savings bank, and now held by it.

That the paper annexed hereto and marked C is a copy of the check given by the said bank as the consideration of said loan and endorsements thereon.

That the American Exchange national bank is the holder of a note for $14,000, made by Daniel Le Roy Dresser to the order of said bank under which was pledged 28 shares of American Brass Company, 240 shares of New England Watch Company and 70 of the American Pin Company, as appears by the proof of claim of said bank on file, and that the said note is a renewal of a loan made November 17, 1898, the proceeds of which loan were credited to the account of said Dresser in American Exchange national bank on said November 17, 1898.

22 That the said American Exchange national bank holds a note for $53,558.75, made by Alexander Greig, Thomas F. Goodrich and Daniel Le Roy Dresser, which is a renewal of part of a loan made to the same parties on March 24, 1902, for $75,000.

That the check for the proceeds of the original loan was made payable to the order of Dresser, Goodrich and Greig.

That the said bank also holds three notes each for $5,000, made by Dresser & Co. to their own order endorsed Dresser & Co., D. Le Roy Dresser, dated respectively September 25, 1902, September 25, 1902, February 25, 1903.

That the said bank claims to hold the securities collateral to the $14,000 note as against the $53,000 note and the liability of Dresser as endorser on the three $5,000 notes.

That the paper hereto annexed and marked B is a copy of a check given to Mr. Dresser by the United States Mortgage and Trust Company as the proceeds of the note of which Exhibit A is a renewal.

BUTLER, NOTMAN, JOLINE & MYNDERSE,
Att'ys for Claimant.

GEORGE H. GILMAN, Att'y for Trustee.

(Copy.)

$30,000.00. NEW YORK, July 24th, 1902.

On demand for value received, I hereby promise to pay to the Trust Company of the Republic, New York, or order, thirty thousand dollars, at office of said trust company, in gold coin or United States notes or Treasury notes, which are a legal tender, having deposited with said trust company as collateral security for the payment of this note, and also as collateral security for all other present or future indebtedness or liability of any kind on my part to
23 the said trust company, absolute or contingent, due or not due, the following property, viz: 300 American Brass Co. and hereby authorize said trust company to hold the said property in its possession or under its control, or which may hereafter come into its possession or control, in which I have or hereafter may have interest, and all present or future indebtedness or liability of said trust company to me, whether due or not due, as security not only for payment of this note, but of every indebtedness or liability on my part to it hereinbefore specified, and to apply any such indebtedness or liability on its part towards the payment or extinction of any such indebtedness or liability on my part or to set off the one against the other, including in either case my indebtedness on this note, and that if, in the opinion of the said trust company or any of its officers, the value of the said collateral securities at any time prior to maturity of this note, should be less than — dollars, at which they are estimated, I will, upon written demand by mail, addressed to me at New York, N. Y., 346 Broadway furnish such further security as will be satisfactory to said trust company; and in case of failure so to do within one day after mailing such demand, this note shall immediately become due though the time of its payment shall not then have elapsed and I hereby give full authority to said trust company to sell the whole or any part of the said property, except money, or any such indebtedness on its part, at any broker's board, or at public or private sale, whenever this note shall fall due and be unpaid, or upon the nonpayment of any indebtedness or liability aforesaid on my part to it, and without notice to me or any other person by advertisement or otherwise of intention to sell, or of the time or place of sale, and without demand of payment of this note or any of the said indebtedness or liability; and after deducting all expenses of collection and sale, to apply the residue of the proceeds in payment of all or any of
24 said indebtedness or liability, in whole or in part, due or not due, including this note, making a rebate of interest upon those not due. And I agree to be liable to the said trust company or other holder hereof for any deficiency; and upon any sale hereunder the said trust company or other holder hereof may purchase the whole or any part of the property sold. In case of my suspension, failure or insolvency any and all indebtedness of mine to the

said trust company, whether present or future and whether evidenced by this note or otherwise, shall become immediately due.

D. LE ROY DRESSER.

"A."

$37,000.00. WATERBURY, CONN., January 1, 1902.

On demand, for value received, I promise to pay the Dime Savings Bank of Waterbury, Conn., at its banking house, thirty-seven thousand dollars, with interest at the rate of 5 % *per cent.* per annum, payable semi-annually in advance.

As collateral security for the payment of this note I have deposited with and hereby pledge to said Dime savings bank four hundred and forty-three shares of the capital stock of the American Brass Co. of Waterbury Conn.

It is hereby agreed that in the event that the market value of the securities hereby pledged, or of any additional or substituted collateral, shall become by depreciation, or be for any other reason at any time less than 20 per cent. in excess of the amount of the principal and interest unpaid of this note, such a payment shall forthwith be made on said note as will raise the market value of said securities to 20 per cent. in excess thereof.

Also, that in the event of my failure to make such payment, or of default of payment of any part of the interest due and payable on said note, or of default of payment of the whole of the principal sum of said note after demand, this note shall be deemed to be due and payable forthwith (no notice of failure of the market value as above, being required to be given me), and the said Dime savings bank is hereby authorized forthwith to sell any portion or all of said securities, or of any additional or substituted collateral, without notice to me, at such time or times and in such manner as the officers of said Dime savings bank shall in their discretion deem proper, at public or private sale, applying the net proceeds to the payment of this note and interest thereon, and expenses of sale, accounting to me for any surplus. Also, that in the event that there shall be a deficiency after such sale, I promise to pay said Dime savings bank the amount thereof forthwith, with interest. Also, that any excess of security upon this note shall be, at the option of the Dime savings bank, applicable to any other notes or claims held by said Dime savings bank against me.

(Signed) D. LE ROY DRESSER.

Copy

"B"

EXHIBIT "C."

The Waterbury National Bank.

No. 60,322. WATERBURY, CONN., Aug. 9th, 1897.

The Mechanic's National Bank of the City of New York

Pay to the order of Mercantile Nat. Bank New York thirty-seven thousand dollars

$37,000.00. A. M. BLAKESLEY, Cashier.

(Endorsed:) Received payment through the New York clearing house Aug. 9, 1897. The Mercantile National Bank of the City of New York.

26 United States Mortgage & Trust Company.

No. 4206. NEW YORK, March 13, 1902.

National Bank of Commerce, in New York,

Pay to the order of D. Le Roy Dresser thirty-five thousand 00/100 dollars.

ARTHUR TURNBULL,
Third Vice Pres't.

CLARK WILLIAMS, Treasurer.

Endorsements.

(Signed:) D. Le Roy Dresser.
(Stamped:) Pay Western national bank or order Dresser & Co.
(Stamped:) March 14 1902, received through New York clearing house Western national bank

District Court of the United States, Southern District of New York.

In the Matter of DRESSER & COMPANY, a Bankrupt.

Certificate of Referee.

That on or about September 1, 1903, and prior to the election of the trustee herein, objection was made to the allowance of
27 the proof of claim filed on behalf of Emma B. Dresser, and that I directed testimony to be taken under such objection. That thereafter and on or about January 21, 1904, the trustee filed verified objections to said claim and I directed that an adjournment be taken for the purpose of enabling the claim to be liquidated or the proof of claim amended, and that a hearing on the objection be brought on upon two days' notice.

That on the 3d day of March, 1904, notice was served upon the trustee for a hearing on the objection on March 7, and upon the 3d day of March an amended proof of claim was filed.

That on the 7th day of March the parties appeared before me and the trustee examined certain witnesses.

All the testimony taken before me is hereto annexed.

That the trustee rested, and I thereupon granted a motion to dismiss the objection.

The verified amended proof of claim filed by claimant is on its face *prima facie* proof of the indebtedness of Dresser & Co. to claimant and the testimony taken herein is insufficient to rebut such proof.

The foregoing is certified to the district judge for his opinion.

Dated March 25, 1904.

STANLEY W. DEXTER,
Referee in Bankruptcy.

(Endorsed:) Certificate of referee on claim of Emma B. Dresser. — Filed March 25, 1904.

28 At a stated term of the district court of the United States, held in and for the southern district of New York, at the court rooms thereof, in the Post Office building in the city of New York, on the 4th day of April, 1904.

Present: Hon. George C. Holt, district judge.

In the Matter of DANIEL LE ROY DRESSER and CHARLES E. REISS, Individually and as Members of the Firm of Dresser & Co., Bankrupts. In Bankruptcy. No. 5728.

On the proof of claim and the amended proof of claim of Emma B. Dresser, filed herein respectively August 25, 1903, and March 3, 1904, the petition of Henry B. Whitney, trustee of the bankrupts above named, verified January 21, 1904; the testimony taken on behalf of said petitioner at the hearings held before Stanley W. Dexter, Esq., referee; the decision of said referee dismissing the trustee's objections and allowing the claim of said Emma B. Dresser and the certificate of said referee thereon, and upon all the papers and proceedings heretofore had herein, and after hearing George H. Gilman, Esq., attorney for said trustee, and Adrian H. Joline, Esq., of counsel for the claimant, it is, on motion of Butler, Notman, Joline & Mynderse, attorneys for said claimant,

Ordered, that said decision of Stanley W. Dexter, referee, dismissing the objections filed by the trustee, and contained in his petition verified January 21, 1904, and allowing the claim of Emma
29 B. Dresser, be and the same hereby is in all respects affirmed.

GEO. C. HOLT, J.

(Endorsed:) Order filed Ap'l 4, 1904.

District Court of the United States for the Southern District of New York.

In the Matter of DANIEL LE ROY DRESSER and CHARLES E. REISS, Composing the Firm of Dresser & Company, Bankrupts.

Edward B. Whitney, the trustee of the above named bankrupt, conceiving himself aggrieved by the order and judgment made and entered herein on the 5th day of April, 1904, in the above entitled proceeding, wherein and whereby it was adjudged that the claim of Emma B. Dresser against the estate of the above named bankrupt be allowed and that the objections of the said trustee thereto be dismissed, does hereby appeal from such order and judgment to the United States circuit court of appeals for the second circuit, for the reasons specified in the assignment of errors which is filed herein, and he prays that this appeal may be allowed and that a transcript of the proceeding and papers upon which said order and judgment was made, duly authenticated, may be sent to the United States circuit court of appeals for the second circuit.

Dated New York, April 9, 1904.

GEORGE H. GILMAN,
Attorney for Trustee, Appellant,
67 Wall Street, New York City.

30 The foregoing petition on appeal is granted and the claim in appeal herein is allowed.

Dated New York, April 12, 1904.

GEO. C. HOLT,
U. S. District Judge.

(Endorsed:) Petition of appeal.—Filed Apr. 12/04.

UNITED STATES OF AMERICA,
Second Judicial Circuit, Southern District of New York, } ss:

To Emma B. Dresser, Greeting:

You are hereby cited and admonished to be and appear before a United States circuit court of appeals for the second circuit, to be holden at the borough of Manhattan, in the city of New York, in the district and circuit above named, on the 11th day of May, 1904, pursuant to an appeal filed in the clerk's office of the district court of the United States for the southern district of New York, wherein Edward B. Whitney as trustee of Daniel Le Roy Dresser, and Charles E. Reiss, composing the firm of Dresser & Company, bankrupts, is the appellant, and you are the appellee, to show cause, if any there be,

firm of Dresser & Goodrich was dissolved, the bankrupt Dresser succeeding to the business, taking all its assets and assuming all its liabilities, including the debt due to the claimant. That this transfer was made at the request of Dresser with the knowledge and consent of claimant, Dresser assuming the liability of the firm of Dresser & Goodrich for a return of the said securities, the proceeds of the loans for which the securities were pledged having been turned over to Dresser and used by him in his business.

That in May, 1897, the copartnership between the bankrupts was formed under the name of Dresser & Co., which succeeded to the business of Dresser, taking all his assets and assuming all his liabilities including claimant's said claim against him. That at the request of Dresser & Co., and with the consent and knowledge
35 of claimant the liability of Dresser fo a return of said securities to claimant was assumed by Dresser & Co., the proceeds of the loans being used by the firm in its business.

The proof of claim proceeds to state in detail the amounts of the loans for which the claimant's securities were deposited as collateral and the value of such securities on March 7, 1903, when the petition in bankruptcy was filed.

The proof concludes with the statement that no part of the debt has been paid, that there are no set-offs or counterclaims and that there is no security of any kind for the said debt.

The objections of the trustee, which it will be remembered relate to the original and not to the amended proof, are, in substance, as follows:—

First. That it appears on the face of the proof that the claimant's securities were loaned to Dresser individually and not to Dresser & Co.

Second. That the debt is unliquidated, the proof showing certain equities, the amount of which is unknown.

Third. That if claimant is a creditor of Dresser & Co., for any amount it is only to the extent of the moneys actually received by the said firm as the proceeds of loans; that the amount of the said loans is not stated, and, therefore, the amount of the said debt can not be liquidated.

Fourth. That the value of the securities as set forth in said proof is in excess of their actual value.

36 Fifth. That the securities alleged in said proof of claim were loaned to Dresser individually and not to the firm of Dresser & Co., and claimant is, therefore, not entitled to prove said claim against the firm of Dresser & Co., or share in the assets of the firm until all the firm creditors have been paid in full.

Upon the issue thus framed the trustee assumed the burden and introduced evidence tending to show that the loans in question were negotiated by and the proceeds delivered to Dresser. There was nothing to show that the proceeds did not go into the firm business, indeed the endorsement of Dresser & Co., on one of the checks for

$35,000. indicates that it was deposited to the credit of the firm and was used in the firm's business.

At the close of the trustee's testimony claimant's counsel moved to strike out the objections and allow the claim. After consideration the motion was granted, the referee ruling that

"The verified amended proof of claim filed by the claimant is, on its face, *prima facie* proof of the indebtedness of Dresser & Co., to claimant and the testimony taken herein is insufficient to rebut such proof."

Upon certificate to the district judge the decision of the referee was affirmed and the trustee appealed to this court.

The assignments of error are substantially as follows:

37 That the court erred (1) in allowing the claim of Emma B. Dresser; (2) in not adjudging the claim insufficient upon its face; (3) in not adjudging that the proof and objections raised an issue as to which the burden was on the claimant; (4) in that it did not adjudge that the *prima facie* effect of said proof of claim was met by the testimony offered; (5) in that the judgment was contrary to the evidence.

There is no question as to the value of the securities or the amount of the claim, the trustee conceding that it is a valid claim against the individual estate of the bankrupt Dresser.

George H. Gilman, for appellant.

Adrian H. Joline, for appellee.

COXE, J.:

Several of the objections urged against the original proof were obviated by the amended proof, and it is manifest that the issue now arises on the amended proof and objections thereto.

It is, at least, doubtful whether the objections are sufficient to present any of the questions now discussed but as the point has not been seriously pressed we shall regard them as presenting fairly the following questions:

First. Does the amended proof, upon its face, state a claim against Dresser & Co.? And

Second. Is it *prima facie* evidence of the indebtedness as therein stated?

38 It is contended by the appellant that the agreement of the firm of Dresser & Co. to be valid must be in writing and as no written agreement is filed with the proof, pursuant to section 57*b* of the law, it must be presumed that no such writing exists and, therefore, the proof is invalid on its face.

The paper is, no doubt, evidence to establish the allegations of the proof of claim but failure to plead it raises no presumption against its existence. *Non constat* the writing which the appellant considers necessary may be in the possession of the claimant to be produced when an issue is presented requiring its production.

But the transaction is not, we think, within the statute of frauds. In Booth *v.* Eighmie, 60 N. Y. 238, the court says: "The test to be

applied under the statute in every case, is whether the party sought to be charged is the principal debtor primarily liable, or whether he is only liable in case of the default of a third person; in other words, whether he is the debtor or whether his relation to the creditor is that of surety to him for the performance, by some other person, of the obligation of the latter to the creditor."

In Bank *v.* Chalmers, 144 N. Y. 432, the court says: "Wherever the facts show that the debtor has transferred or delivered to the promissor, for his own use and benefit, money or property in consideration of the latter's agreement to assume and pay the outstanding debt, and he, thereupon has promised the creditor to pay, that promise is original, upon the ground that by the acceptance
39 of the fund or property under an agreement to assume and pay the debt the promissor has made that debt his own, has become primarily liable for its discharge, and has assumed an independent duty of payment irrespective of the liability of the principal debtor."

See also as bearing on the question involved: Hendrick *v.* Lindsay, 93 U. S. 143; Johns *v.* Wilson, 180 U. S. 440; Barlow *v.* Meyers, 64 N. Y. 41; Coster *v.* The Mayor, 43 N. Y. 399.

The language quoted is applicable to the present situation. The bankrupts took over the entire property of Dresser, including the claimant's securities and the moneys obtained from the loans, and assumed all his liabilities. The benefits to be derived from the claimant's property were transferred to the firm and this constituted a new and sufficient consideration to support its promise and obligation to return or account for the securities. The averments of the proof leave no doubt as to the true nature of the transaction. The claimant has lost the possession of her securities, the bankrupts took them, obtained money thereon, which they used in their business, and agreed to return them to the claimant.

There is some obscurity in the allegation that the money derived from the loans was turned over to the bankrupts, but it is evidently due to a clerical omission, and is not fatal to a document which need not necessarily conform to the strict rules of pleading. The amended proof of claim being properly verified and valid upon its face is *prima facie* evidence of the indebtedness of the bankrupts.

40 We are dealing here with a statute the primary object of which is to collect the property of the bankrupt speedily and divide it equally among his creditors. Analogies drawn from pleadings in actions at common law and in equity furnish little assistance in the interpretation of such a law. If the doctrine be once established that a proof of claim in bankruptcy is entitled to no greater weight than a complaint in an ordinary action at law the most serious results will follow. Any vindictive or contumacious creditor can, by filing objections compel creditors to come from distant States and even from foreign countries to testify in support of their claims before a word of testimony impeaching their validity has been adduced. No one disputes that in the absence of objection the

proof of claim stands as sufficient warrant for the payment of a dividend based thereon. It is not then a mere pleading, confessedly it possesses some probative force. This being so it is not easy to approve the logic which deprives it of all weight as evidence upon the mere filing of an objection. If the appellant's contention be sustained an efficient administration of the law might, as we have seen, be made difficult, if not impossible.

We see no reason or necessity for such an interpretation of the law. On the other hand a construction which requires the objector to offer some proof before subjecting the creditor to the expense and annoyance of presenting sustaining evidence seems to be in
41 accord with the intent and purpose of the act and to present a simple, efficient and perfectly fair rule of procedure. In a vast majority of instances the claims of creditors are susceptible of the most simple proof. The trustee has the bankrupt's books at his disposal and can at any time call upon the bankrupt for assistance. In cases where exaggerated or fraudulent claims are filed there is no difficulty in ascertaining and proving facts sufficient to establish the true character of the claim, thus putting the claimant upon his proof.

The subject was carefully examined *In re* Sumner, 101 Fed. Rep. 224, and the conclusion was reached that under section 57 *a*, *b*, *d* and *f* of the act the objector, though not required to disprove the claim must produce "evidence whose probative force shall be equal to, or greater than, the evidence offered in the first instance by the claimant."

This, we think, is a correct statement of the law and is in accord with general order XXI (6) which seems to indicate that the claim must stand until evidence has been adduced which authorizes the referee to expunge or reduce it. See also *In re* Shaw, 109 Fed. Rep. 780; *In re* Filter, 7 *id.* 904.

The order of the district court is affirmed.

(Endorsed:) United States circuit court of appeals, second circuit. In the matter of Samuel Le Roy Dresser and Charles E. Reiss, bankrupts. Edward B. Whitney, trustee, appellant, Emma B. Dresser, claimant, appellee. Decision Coxe J., United States circuit court of appeals, second circuit. Filed Jan. 9, 1905. William Parkin, clerk.

42 At a stated term of the United States circuit court of appeals, in and for the second circuit, held at the court rooms in the post office building in the city of New York, on the 19th day of January one thousand nine hundred and five.

Present: Hon. William J. Wallace, Hon. William K. Townsend, Hon. Alfred C. Coxe, circuit judges.

In the Matter of DANIEL LE ROY DRESSER and CHARLES E. REISS, Bankrupts; EDWARD B. WHITNEY, as Trustee, Appellant.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the district court of the United States, for the southern district of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the order of said district court be and it hereby is affirmed with costs.

It is further ordered that a mandate issue to the said district court in accordance with this decree.

W. J. W.
W. K. T.
A. C. C.

43 Endorsed: United States circuit court of appeals, second circuit. *In re* Dresser. Order for mandate. United States circuit court of appeals second circuit. Filed Jan. 19, 1905. William Parkin, clerk.

44 In the Supreme Court of the United States.

EDWARD B. WHITNEY, as Trustee in Bankruptcy of Dresser & Co., Bankrupts, Appellant,
against
EMMA B. DRESSER, Appellee.

I certify that in my opinion the determination of the questions involved in the allowance of the claim of Emma B. Dresser, the above named appellee, against the estate of the above named bankrupts in the hands of the above named Edward B. Whitney as trustee in bankruptcy thereof, is essential to a uniform construction of the act entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, throughout the United States.

Dated at Washington, D. C., February 1, 1905.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

Endorsed: *In re* Dresser & Co., bankrupts. Certificate. United States circuit court of appeals, second circuit. Filed Feb. 6, 1905. William Parkin, clerk.

45 In the Supreme Court of the United States.

EDWARD B. WHITNEY, as Trustee in Bankruptcy of Dresser & Co., Bankrupts, Appellant,
against
EMMA B. DRESSER, Appellee.

And now comes Edward B. Whitney as trustee as aforesaid, appellant, by his counsel, and respectfully represents that he feels himself to be aggrieved by the proceedings and decree in the above entitled cause in the United States circuit court of appeals for the second circuit, and says that in the record and proceedings therein there is manifest error in each and every one of the following rulings of the court, to wit:

First. In overruling appellant's assignment of error that the district court of the United States in and for the southern district of New York erred in that it allowed the claim of Emma B. Dresser against the estate of the above named bankrupts.

Second. In overruling the appellant's assignment of error that said court erred in that it did not adjudge that the said proof of claim was insufficient on the face thereof.

Third. In overruling the appellant's assignment of error that said court erred in that it did not adjudge that the burden of proof was on the claimant.

Fourth. In overruling the appellant's assignment of error that said court erred in that it did not adjudge that the *prima facia* effect of said proof of claim was met by the testimony offered on behalf of the trustee.

46 Wherefore the appellant respectfully prays that the errors assigned be examined and corrected by this honorable court and that the judgments entered herein by the district court and circuit court of appeals be reversed and the cause remanded for further proceedings not inconsistent with law.

Dated, New York, January 31, 1905.

EDWARD B. WHITNEY,
As Trustee of Dresser & Co., Bankrupts, Appellant.

Endorsed: *In re* Dresser & Company, bankrupts. Assignment of errors. United States circuit court of appeals, second circuit. Filed Feb. 6, 1905. William Parkin, clerk.

47 UNITED STATES OF AMERICA, Southern District of New York, } *ss.*:

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 46 inclusive, contain a true and com-

plete transcript of the record and proceedings had in said court, in the case of In the matter of Daniel Le Roy Dresser and ano., bankrupts, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 8th day of February in the year of our Lord one thousand nine hundred and five and of the Independence of the said United States the one hundred and twenty-ninth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, Clerk.

48 UNITED STATES OF AMERICA, ss:

To Emma B. Dresser, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an appeal, filed in the clerk's office of the United States circuit court of appeals for the second circuit wherein Edward B. Whitney as trustee in bankruptcy of Dresser & Co. is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Rufus W. Peckham, associate justice of the Supreme Court of the United States, this 1 day of February, in the year of our Lord one thousand nine hundred and five.

R. W. PECKHAM,
Associate Justice of the Supreme Court
of the United States.

[Endorsed:] In the supreme court Edward B. Whitney as trustee in bankruptcy of Dresser & Co. bankrupts appellant ag'st Emma B. Dresser appellee Assignment of errors certificate and citation G. H. Gilman att'y for trustee 67 Wall St. N. Y. city Service of a copy of the within assignment of errors certificate & citation is this day admitted Dated N. Y. Feb'y 6, 1905 Joline, Larkin & Rathbone att'ys for claimant Emma B. Dresser

Endorsed on cover: File No. 19,632. U. S. circuit court of appeals, 2d circuit. Term No. 532. Edward B. Whitney, as trustee in bankruptcy of Dresser & Co., appellant, *vs.* Emma B. Dresser. Filed February 17th, 1905. File No. 19,632.

FILE COPY.

Office Supreme Court U. S.
FILED
FEB 20 1905
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

ON APPEAL FROM THE

Circuit Court of Appeals for the Second Circuit.

OCTOBER TERM, 1904.

No. ~~532~~ 180.

EDWARD B. WHITNEY, as Trustee in Bankruptcy of Dresser & Co.,

Appellant,

against

EMMA B. DRESSER,

Appellee.

MOTION TO ADVANCE.

GEORGE H. GILMAN,
Attorney for Appellant,
67 WALL STREET,
New York City.

C. G. BURGOYNE, Walker and Centre Streets, N. Y.

In the Supreme Court of the United States,

OCTOBER TERM, 1904.

EDWARD B. WHITNEY, as Trustee in Bankruptcy of Dresser & Co.,
Appellant,

AGAINST

EMMA B. DRESSER,
Appellee.

No. 532.

Appeal from the Circuit Court of Appeals for the Second Circuit.

Motion to Advance.

This is an appeal from the affirmance of an order allowing a claim against a bankrupt estate by the wife of one of the bankrupts. The claim had been reserved by the referee prior to the election of the trustee. It was not accompanied by a written instrument under § 57*b* of the Bankruptcy Act.

The appeal is based upon a certificate by Mr. Justice PECKHAM that in his opinion the determination of the questions involved in the allowance of this claim is essential to a uniform construction of the Bankruptcy Law.

The principal question presented is this: *Is the burden of proof, when objections are filed by the trustee in bankruptcy under § 57d. to a claim presented against the bankrupt estate, upon the trustee or upon the claimant?*

It is respectfully submitted that, as this is a question which must arise frequently all over the United States, it is important that a uniform construction of the act should be obtained as early as possible.

With relation to the form of the record an explanation may be necessary from the fact that the record contains no findings of fact and conclusions of law under General Order XXXVI, subdivision 3. The Circuit Court of Appeals did not make and file such findings and conclusions and after the advisability of an appeal was determined upon it was too late to apply for that within the thirty days allowed by subdivision 2; and moreover it appeared to us as to the court that this case is not within the intent of subdivision 3, since the question does not arise upon the evidence, the only questions to be presented to this court being whether the proof of claim stated a valid claim upon its face and whether as above stated the burden of proof is upon the claimant or upon the trustee.

In order to obtain an early decision the appellant is willing to submit the cause upon briefs without oral argument, if permitted.

GEORGE H. GILMAN,
Of Counsel for Appellant.

Service of a copy of the foregoing and notice of motion for February 20, 1905, at one o'clock is this day admitted.

Dated N. Y., February 11, 1905.

ADRIAN H. LARKIN,
Of Counsel for Emma B. Dresser.

FILE COPY.

Office Supreme Court U. S.
FILED
JAN 9 1906
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

ON APPEAL FROM THE

Circuit Court of Appeals for the Second Circuit.

OCTOBER TERM, 1905.

No. 180.

EDWARD B. WHITNEY, as Trustee in Bankruptcy of Dresser & Co.,

Appellant,

against

EMMA B. DRESSER,

Appellee.

BRIEF FOR APPELLANT.

GEORGE H. GILMAN,
of Counsel for Appellant,
67 Wall Street,
New York City.

B. H. TYRREL, PRINTER, 203-9 FULTON STREET, NEW YORK CITY.

Supreme Court of the United States.

OCTOBER TERM, 1905.

EDWARD B. WHITNEY, as Trustee in bankruptcy of Dresser & Co., Appellant, *vs.* EMMA B. DRESSER.	No. 180.

Appeal from the United States Circuit Court of Appeals, Second Circuit.

Brief for Appellant.

The decree appealed from affirmed an order of the District Court, which in turn affirmed an order of Stanley W. Dexter, Esq., Referee in Bankruptcy, allowing the appellee's claim for $88,145 against the *partnership estate* of Dresser & Co.

The appellant concedes that her claim is good as against the *individual estate* of Daniel LeRoy Dresser, one of the partners.

This appeal is taken upon a certificate of a Justice of this court under the Bankruptcy Law, § 25 *b* 2.

Statement of the Case.

Bankruptcy Form No. 56, prescribed by this court, directs that the referee's certificate should "state *the question, a summary of the evidence* relating thereto, and the finding and order of the referee thereon". "The question" to be certified is a question which "arose pertinent to the said proceedings."

The order of the referee in the present case is an order dismissing the trustee's objection to an amended proof of claim (p. 18).

The question is stated by the referee as follows:

> The verified amended proof of claim filed by claimant is on its face *prima facie* proof of the indebtedness of Dresser & Co. to claimant and the testimony taken herein is insufficient to rebut such proof.
>
> The foregoing is certified to the District Judge for his opinion.

The evidence is not summarized as required by the form, but is inserted *in extenso*.

The claimant, Emma B. Dresser, is the wife of one of the bankrupts (p. 11, top).

Prior to the election of the trustee she had filed

a proof of claim, which had been objected to; and thereafter the trustee filed verified objections thereto (p. 17, foot). The original claim was that she had loaned her husband certain securities which had been deposited as collateral for loans, the proceeds of which loans were turned over to the firm of Dresser & Co. The only one of the trustee's objections which is now of importance is objection V, that the securities were loaned to him individually and not to the firm, and that she is not entitled to prove against the firm or participate in its assets until all of the firm creditors have been first paid in full (p. 6).

The referee permitted an amendment of the claim, which amendment was filed March 3, 1904 (pp. 17-18). On the same day the claimant served notice upon the trustee for "a hearing on the objection on March 7" (p. 18, top); thus assuming that the objection to the original claim stood as an objection to the amended claim. The hearing was had on March 7 pursuant to this notice (p. 18). It has been conceded that the objection to the original claim stood as applicable to the amended claim (p. 21)—a necessary concession in view of the procedure above stated.

The amended claim is for $88,145, and is based upon the following allegations (pp. 2-4):

That prior to May 1896 the claimant loaned the firm of Dresser & Goodrich certain securities.

That said securities were deposited by Dresser

& Goodrich as collateral for loans to them.

That about said date the bankrupt Daniel LeRoy Dresser took over the assets of said firm and assumed its liabilities, including the liability of this claimant. That the assumption of this liability to her was made with her knowledge and consent; *and that the proceeds of the loans for which the securities had been deposited as collateral were turned over to him and used by him in his business.*

That about May, 1897, the present bankrupt firm was formed by said Daniel LeRoy Dresser and one Charles E. Reiss under the firm name of Dresser & Co., "said partnership succeeding to the said business of said Daniel LeRoy Dresser taking over all his assets and assuming all his liabilities, including deponent's said claim against him." That at the request of said new firm and with her knowledge and consent his liability "for a return of said securities to deponent was assumed by said Daniel LeRoy Dresser and said Charles E. Reiss, composing the firm of Dresser & Co., and used by said firm in its business."

There is no averment here, like that above italicized, that the proceeds of the prior loans were turned over to the new firm.

The amended proof of claim then, after stating the securities pledged and their value, proceeds to state "That the amounts of *the loans* for which the securities of deponent *were* deposited as collateral are as follows" setting forth the names of the creditors and the amounts of the loans, *but not their dates.* The only loans to which the reference is applicable are those to Dresser & Goodrich, as aforesaid.

The balance of the proof of claim it is unneces-

sary to set forth because it relates only to the amount, which is conceded; the only dispute being, as above stated, whether the claim is one against the firm or against the individual estate.

Judge Coxe in his opinion interprets the claim as stating that "the bankrupts took them [the securities], obtained money thereon which they used in their business, and agreed to return them to the claimant"; and "There is some obscurity in the allegation that the money derived from the loans was turned over to the bankrupts, but it is evidently due to a clerical omission and is not fatal to a document which need not necessarily conform to the strict rules of pleading" (p. 24). Having thus supplied an averment, he treated it as evidence which, the trustee not having foreseen and met it, established the claimant's case. The trustee believes that the claimant omitted the averment because she could not honestly make it; but this is perhaps as speculative as the learned judge's treatment of the matter.

Judge Coxe also refers to the trustee as having "assumed the burden" (p. 22, foot) as if in some way the trustee had waived his contention that the burden of proof was upon the claimant. The referee's certificate shows that he did not understand that claim to be waived, although the trustee introduced some evidence. It was not claimed by the appellee before the referee or before the District Court or the Circuit Court of Appeals that the question thus certified was not a question properly in the case; and it was in fact argued and decided by the Circuit Court of Appeals upon its merits, and not disposed of upon any technicality.

The trustee, while not waiving his contention that the burden of proof was upon the claimant, went as far as he could without calling either the claimant herself or one of the members of the bankrupt firm. He called as witnesses officers of three of the four corporations with which the claimant's securities had been pledged, and put in by stipulation the facts with relation to the fourth. It appeared by this testimony that every one of the loans upon this collateral was made to Daniel LeRoy Dresser individually, and that the loans were evidenced by his individual promissory notes, upon none of which notes was the firm a party. These notes appear in the record as follows:

United States Mortgage & Trust Company (pp. 12-13).

American Exchange National Bank (p. 14).

Trust Company of the Republic (p. 15).

Dime Savings Bank of Waterbury (p. 16).

The earliest date of any of these transactions was August 9, 1897.

It indeed appears that the American Exchange National Bank held also three small notes made by the firm to the order of Dresser and subsequent to the loan, and that it claimed to hold these securities as collateral to "the liability *of Dresser as endorser* on the three $5,000 notes" (p. 14, foot); but it is not attempted to be shown that there was any basis for this claim, and it is not claimed that they could be used as collateral for the liability of the firm as makers.

It also appears that the United States Mortgage & Trust Company note (made February 13, 1903) was given as a renewal of the previous note; that the latter note secured a loan evidenced by a check of $35,000 to Dresser's individual order; and that this check had been endorsed by him to his firm and deposited in its account. No attempt was made (although the facts were of course known to the claimant's husband) to show that the firm was in any way liable, even to him.

The trustee having thus proved *that all of the loans obtained upon the claimant's securities were obtained by Dresser individually and upon his own individual obligations,* rested. The assumption of the Court of Appeals that the bankrupts took the securities, obtained money thereon, and used it in their business, is without support and is contrary to the undisputed evidence.

Specification of Errors.

The assignment of errors is to be found at p. 27. We contend that the District Court in sustaining the referee's ruling erred in that it allowed the claim of Mrs. Dresser; in that it did not adjudge that her proof of claim was insufficient upon its face; in that it did not adjudge that an issue was raised as to which the burden of proof was on the claimant; and in that it did not adjudge that the *prima facie* effect of the proof of claim was met by the testimony offered on behalf of the trustee.

I.

The burden of proof as to claims against a bankrupt estate is upon the claimant, and he is not relieved of it by the ex parte statements in his proof of claim.

It is seldom that the question as to the burden of proof arises. Ordinarily the mass of the claims presented against a bankrupt estate are shown by book entries which are admissions on the part of the bankrupts, and binding upon persons claiming under them and therefore *prima facie* evidence against the trustee. Most other claims are evidenced by writings of some kind; or they are either so small in amount, or so fair on their face, or so satisfactorily explainable, that nobody makes objection to them. If no one objects, the trustee and referee are quite justified in assuming them to be correct and allowing them. If any one objects, the claimant has no difficulty in making a *prima facie* case without oral testimony. It is to the interest of all parties to reduce the delay and expense of litigation connected with the bankrupt estate as far as possible. Purely technical or factious objections to a proof of claim are altogether improbable except when there is a contest over the appointment of a trustee. In such case it is customary for the referee (upon precedents hereinafter cited) to allow provisionally all claims except those of an unusual character which have something improbable or suspicious about them, or which, without being corroborated by any extrinsic evidence, depend wholly upon the oath of the bankrupt or some member of his family.

That this claim was regarded as belonging to the latter class is shown by the fact that it was not allowed by the referee when objected to in the preliminary proceedings, but was laid aside for further consideration.

The question as to the burden of proof therefore, which is one of the main questions involved in this appeal, is one that practically arises only in exceptional instances. The case at bar is a peculiarly illustrative one.

A claim having been put in against the firm estate, which the trustee believed to be a valid one as against the individual estate of the claimant's husband, he did not call upon the claimant to establish by legal evidence her ownership of the securities in question, but introduced sufficient evidence to show that they were used by her husband as security for his individual debts, not those of the firm—that is, he produced all of the evidence which he could possibly produce against the claim without calling any one of three witnesses, such witnesses being the two bankrupts and the claimant herself. The learned Circuit Court of Appeals remarks that a trustee "can at any time call upon the bankrupt for assistance", apparently thinking that this trustee should have subpoenaed the bankrupts in the present case; but if he had done so he would have been forced to concede that they were entitled to credence, although he might believe that no one of the three

could be believed upon oath, and although he might be provided with ample testimony to impeach them if they should take the stand in support of the claim; and *non constat* but that such a belief would have been justified. (Matter of Dresser, 13 Am. B. R., 616.)

It may be suggested that the trustee's examination of the claimant would be in the nature of a cross-examination, the affidavit being regarded as her direct examination, so that he would still be at liberty to impeach her testimony. We do not know of any authority which would make it safe to take this course; and no such argument could apply to the testimony of the bankrupts; and it is evident that the testimony of the bankrupts is the testimony upon which this case would necessarily turn. For the question of fact in the case is whether the bankrupt firm, as a firm, had guaranteed the fidelity of one of the bankrupts as bailee; and the original claim of the claimant shows that she has no present recollection of it, if (as is quite unlikely) she ever had any personal knowledge of the matter, but that her allegation was based upon information received from others.

It is of course a general principle, applicable to every form of legal or equitable procedure in courts administering the Anglo-Saxon system of jurisprudence, that a mere *ex parte* affidavit is not to be treated as legal evidence in support of the claim embodied therein, if objection is made to

the claim and the issues thereby raised are brought to trial.

It is for the appellee here to show that an *ex parte* affidavit in the form of a proof of claim under the Bankrupt Law has any higher standing in this respect than a verified bill in equity, or a verified complaint under the Code practice, or a verified claim against an estate in a probate Court.

There is nothing in the inherent nature of insolvency proceedings which would give a higher standing to *ex parte* affidavits submitted in those proceedings than is given in Courts of Probate or in other branches of the Federal Courts.

The question has come up under State insolvency laws, and so far as we are aware proofs of claim under those laws are always treated, if an issue is raised by objections filed thereto, as in the nature of pleadings, which must be supported by legal evidence if the trustee or assignee of the insolvent estate considers it advisable for the protection of the creditors that legal evidence should be called for. This has been the practice in the New York State Courts (see Matter of Jeselson, 10 Daly, 104), and was recently confirmed by the Supreme Court of Illinois in Crandall *v.* Carey-Lombard Lumber Co., 164 Ill., 474, 478, where the Court said:

"It is contended that when the claim was filed with the assignee, duly verified, the party filing exceptions had the burden of proof to overthrow the claim. The ruling of the Court below was right in requiring appellants to assume the burden of proof. If no exceptions had been filed the claim would have been allowed, but exceptions having been filed, the mere presentation of the alleged

claim so verified had no tendency to establish it and appellants were bound to prove it."

In Maryland there is no statute regulating the verification of claims in insolvency proceedings. But this same rule was recognized, the Court saying: "When a fund is distributed in a Court of Equity, if a claim is not disputed, it is always allowed by the auditor on such proof as is required for authenticating a claim in the Orphans' Court. * * * Of course, such proof is only of a primary character, and the opposing party may demand full proof if he choses to do so." (Bank *v.* Lanahan, 66 Md., 461, 468.)

The better approved practice, under the old Bankrupt Law of 1867, was to dispense with the best evidence in some instances in the preliminary proceedings, but to require it afterwards. That law contained a peculiar feature—a feature not found in the present statute—which substituted a deposition taken before an officer of the United States* for the mere affidavit or unverified pleading, known to other systems of practice.

Section 22 of that law (14 Stat., 527, see Rev. St., §§ 5076, 5079) required proofs of debt to be taken before one of the registers of the court, or a commissioner of the Circuit Court, or (if the creditor were abroad) before any minister, consul or vice-consul of the United States.

The same section (see § 5077) called the proof of claim "*a deposition* in writing" and provided that it should not "be allowed unless all the state-

*After the practice had become settled under this law the power to take depositions was extended to notaries public in 1874 (18 Stat., 186), but in other respects the practice was left unaffected.

ments set forth in such deposition shall appear to be true." It further provided (see § 5078) that the Court "may require or receive further pertinent evidence either for or against the admission of any claim"; that (see § 5080) after the proof is "satisfactory to the register" it should be sent to the assignee and registered in a book kept by him for that purpose, which should be open to the inspection of all the creditors; and that (see § 5081) the Court might "on the application of the assignee or of any creditor or of the bankrupt, or without any application" examine upon oath the bankrupt, the claimant, or anybody else concerning the matter. It appeared from this and the following section (see §§ 5081, 5085) that the proof of claim under the practice of 1867 was not regarded as complete until the register, assignee (if the assignee had then been already elected) and court all had had an opportunity to inspect it, and the Court had taken further proofs or come to the conclusion (if the taking of further proofs was requested by anybody) that they were unnecessary. Of this procedure the leading text writer said (Bump on Bankruptcy, 9th ed., p. 87):

> "The proof is neither a deposition nor an affidavit, as known in the ordinary practice of the law. It is the result of an examination made by a duly authorized officer. In no other court of justice is such testimony required for the due proof of any debt; and it is evident that Congress intended that the Court and its officers should, by a careful examination of the creditor, purge his conscience and ascertain the real nature of his claim, and that no fraud or combination, either for or against the bankrupt, exists."

Under this peculiar statute a practice arose which gave to the "deposition," although *ex parte*, a higher standing at the early stages of the proceeding than belongs to the familiar verified pleading or affidavit of claim under our other systems of procedure.

The most carefully considered case on the subject is entitled *In re* Northern Iron Co., 14 N. B. R., 356. In that case a claim was presented upon a promissory note and the register demanded that a sworn copy of the note be produced and annexed to the proof of claim. He refused to allow the claim without it. The question came up preliminarily before the election of the assignee. The case was taken to the District Judge (now Mr. Justice Brown) who affirmed the decision of the register; but in affirming the decision he said *that the filing of merely a sworn copy should be permitted only at this preliminary stage*, and that the note itself must be produced before payment of a dividend. He stated that the reason for allowing a copy to be filed preliminarily was that the original note is so often needed for the purpose of suing other parties liable thereon. The matter was appealed to the Circuit Court, whose opinion was rendered by EMMONS, J.:

> "*As a very general rule we think the register should insist upon the same degree and character of proof as that demanded in a trial at law or hearing in equity.* We do not mean to say that exceptional cases may not arise when a Register would be justified in accepting a less degree of proof for the purpose of allowing the creditor to vote for the assignee * * * *for this single purpose,*

leaving the creditor to more full evidence when the assignee was appointed.''

The same practice was followed in the Second Circuit (Matter of Knoepfel, 1 Ben., 398, Blatchford, J.; Matter of Jaycox, 7 N. B. R., 303, 310, Hall, J.).

The remarks of Judge LOWELL in the case entitled *In re* Saunders, 2 Low, 444, which might be supposed to indicate a different practice in the First Circuit, were made upon the preliminary hearing for the purpose of deciding who was entitled to vote for assignee (see his remarks *In re* Bartusch, 9 N. B. R., 478). We pressed the above cases upon the attention of the learned Circuit Court of Appeals, and cannot understand why no reference is made to them in its opinion, while it cites the lone decision to the contrary (Nixon, J., in the Felter case, 7 Fed. Rep., 904).

The Bankruptcy Act of 1898 has returned to the familiar system of pleading.

The claim is no longer evidenced by a ''deposition,'' but is a mere ''statement under oath in writing signed by a creditor'' (§ 57 *a*). These statements under oath are called ''proof of claims'' (*id.*), and a claim thus stated is said to have been ''proved,'' but it has yet to receive ''allowance'' (57 *c*). The word ''proved'' therefore does not have its more general legal significance; for under that significance of the word there could be no question of the allowance of the claim.

The procedure upon filing the so-called ''proof of claims'' is as follows (57 *d, f*):

''*d.* Claims which have been duly proved

shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion.

* * * * * * *

f. Objections to claims shall be heard and determined as soon as the convenience of the court and the best interests of the estates and the claimant will permit."

After a claim has once been allowed it "may be reconsidered for cause" under § 57 *k*, and in that case Mr. Collier is of the opinion that the burden is cast upon the person who petitions for reconsideration (Collier on Bankruptcy, 5th ed., p. 423). There is something to be said on each side of this question, and it seems to us that the rule is somewhat too broadly stated, for a claim might be reconsidered under such circumstances as would make it more proper to rehear it *de novo*, as when some suspicion of fraud might attach, or when the allowance was due to some inadvertence. This is, however, a question that is not involved in the present case, as Mrs. Dressler's claim had never been allowed, but had been "continued for cause by the court upon its own motion."

We respectfully submit that the general principle by which a person (whether trustee for others or otherwise) against whom a claim is made, has the right to have it proved under oath in open court, subject to cross examination, and without being required himself to waive his right to impeach the veracity either of the claimant or

of the bankrupts, is a sound principle and one applicable to bankrupt estates as well as to all others; that there is nothing in the present statute which indicates an intent to establish any exception to it; that it is specially applicable when the claim is presented by the wife of one of the bankrupts, and supported only by her uncorroborated affidavit—an affidavit which contradicts a prior sworn statement of the claimant herself, and is to some extent contradicted by the testimony of independent witnesses; and that it is specially applicable also when the alleged contract is one which would naturally (if not necessarily) be in writing, while no writing is filed as required by § 57 *b* of the statute.

The practice in the Second Circuit under the present Bankruptcy Law, unlike that under its predecessor, has been to the contrary, following and extending Judge Thomas' decision *In re* Sumner, 101 Fed. Rep., 224. In other circuits there seem to be no decisions upon the general question of burden of proof, but it has been held that the *onus* is heavy upon the claimant when, as here, a member of the bankrupt's family (*In re* Domenig, 128 Fed. Rep., 146; *In re* Wooten, 118 *id.* 670). The point is not touched by *In re* Shaw, 109 Fed. Rep., 780, cited below. There the question arose "what probative effect should be given to such affidavit?" Objection had been made to it, but the objection was in the nature of a *confession and avoidance*. The burden of proof was therefore upon the objector, who assumed the burden but failed to support it. Judge McPherson held that, the avoidance having failed, the claim stood confessed. Since, however, there had been a misunderstanding of the practice on the part of

the objecting party, he sent the case back again to the referee for further proceedings. Upon the rehearing (112 Fed. Rep., 947), the trustee seems to have introduced no evidence, and the claim was dismissed for inherent improbability.

Our construction of the statute is approved by Mr. Loveland (Loveland on Bankruptcy, 2nd ed., p. 341). Mr. Collier does not commit himself upon the question.

II.

Assuming the proof of claim to be sufficient upon its face, and to cast the burden of proof upon the trustee, nevertheless it should have been dismissed upon the evidence.

(*a.*) The claimant's story was shown to be false.

She pleaded in effect that certain loans were made upon her securities by Dresser & Goodrich; that *these loans* were made by certain named corporations at certain named figures; and that they were still outstanding at the time of the bankruptcy. Obviously she intended the court to infer, and although she did not say so it did infer, that the proceeds of the loans came into the hands of the bankrupt firm at its formation, in consideration of an assumption by it of the responsibility for the return of her securities.

The trustee proved, on the contrary, that *the inception of each one of these specified loans* was after the formation of the bankrupt firm, and that

each loan was obtained by claimant's husband *in his individual capacity.* The securities were not in the hands of pledgees, or of the firm, but in his hands.

It is respectfully submitted that claimant now, upon the most favorable view of her position, was called upon to produce further evidence, and amend her claim again to conform to it. As it stands, the claim is subject to the maxim *falsus in uno falsus in omnibus.* The loans described in the proof of claim being now shown to have been therein antedated, and not to have been existent at the time of the formation of the bankrupt firm, they could not have been included in its contract of assumption of its predecessor's liabilities. No other and earlier loans are pleaded. *These* loans, from these particular corporations and of these particular amounts, are the only loans that are averred to have been made upon her securities, and therefore the only ones which the court can take into consideration. Nor is there even any independent averment that the securities were in her husband's possession or control when the bankrupt firm was formed; nor does a general contract of assumption of liabilities include a guaranty to a wife that her husband will properly account to her for such of her property as may be where a wife's property presumably is— in the husband's custody.

(*b.*) The appellee below made the somewhat singular contention that the trustee had affirmatively proved the liability of the bankrupt firm for plaintiff's securities, because the original check of $35,000, representing one (and only one) of the four loans, was collected through the bank account

of the firm (p. 17). The learned court seem to have adopted this view, remarking that the indorsement indicates that the check was used in the firm's business (p. 23). There are various answers to this contention.

In the first place, the presumption is, when money is paid or a negotiable instrument made or transferred by one person to another, not that a liability is being created, but that a liability is being paid off (2 Greenleaf on Evidence, § 112; Poucher *v.* Scott, 98 N. Y., 422). The presumption therefore in the absence of any testimony upon the point is that Dresser had owed his firm $35,000, and paid off the debt in this way.

This presumption was reinforced by the fact that the firm was not a party to the note given in renewal of this loan (p. 12). If the original note was for a firm indebtedness, naturally the firm would have appeared as maker or endorser of the renewal note. There are various common motives for a partner endorsing a note into the firm account. He may be paying an indebtedness to the firm, as the law presumes; or he may be loaning moneys to it as its individual creditor, in which case he is postponed to the other creditors (p. 28, *infra*); or he may be making a contribution to capital, in which case he is of course similarly postponed; or he may be, as is so common, using his firm account as a convenient place of deposit for his individual funds.

It is an "erroneous but popular notion" (1 Lindley on Partnership, 189) that the firm estate becomes liable if money is borrrowed by an individual partner upon his own credit for the benefit of the firm. The law is well settled to the contrary (*Id.* and 2 *id.*, 703, 721). Hence, even if the

learned court's inference of fact were admissible, it would not affect the result. The authorities are in unison upon this point (LeRoy *v.* Johnson, 2 Pet., 186; Jaques *v.* Marquand, 6 Cow., 497, 503; National Bank of Salem *v.* Thomas, 47 N. Y., 15, 19-20). Among the authorities cited in the last mentioned case is Bevan *v.* Lewis, 1 Sim. 376, which was a bankrupt case. The creditor of the individual partner, the moneys loaned having gone for the benefit of the firm, was held to stand in his debtor's shoes and to be postponed to the firm creditors. Lord Hardwicke held in a similar case (*Ex parte* Hunter, 1 Atk., 143) that the creditor of the individual partner had no direct claim in bankruptcy, but that "by way of security he is entitled as standing in the place of that partner who has paid the money to the use of the partnership trade." It does not appear whether he was postponed to the other creditors, but the decision was so interpreted in the Jaques case *supra;* and if this be not the correct interpretation, it has been to that extent overruled (See 2 Lindley, 721; Read *v.* Bailey, L. R., 3 App. Cas., 94, 101).

(*c*) Even on claimant's own story, is there any allegation of a valid contract by the firm to guarantee to the claimant her husband's liability *as bailee* of her bonds and stocks? He had borrowed those bonds and stocks long ago, for the benefit of another firm, if the allegations of the amended claim be true. He had subsequently received individually all of the assets of that firm, including those obtained upon the pledge of these securities, so that there was full consideration for *his* agreement to assume, among its other liabilities, this one. The allegation as to the survival

of these liabilities at the time when he succeeded to the business of the old firm is not repeated when the affiant's narrative reaches the time of the organization of the new firm; nor is it alleged that the new firm succeeded to any assets obtained by means of the use of any of her securities. The learned court below say, indeed, that this "is evidently due to a clerical omission", and supply the omission by an amendment without any proof to support it. We respectfully submit that this is indefensible. The trustee had the right to act upon the affidavit as it was, not as it might have been, and to assume that when after six months' consideration it had been amended to suit her counsel, it was as strong as claimant was willing to swear to; and certainly that it would not be received as evidence of what it did not state.

It is conceivably possible, however queer, that the new firm might promise Dresser that it would guarantee to his wife the return of her securities. Such a promise might conceivably be written or oral.

If written, however the instrument evidencing it must be filed with the proof of claim, or a statement that it was lost or destroyed must be filed therewith (§57 *b*). We submit therefore, notwithstanding the ruling below to the contrary, that a claimant who neither files a writing nor accounts for its non-production must be presumed to have had none.

The contract, if oral, would have been invalid. The Statute of Frauds of New York State avoided every oral "special promise to answer for the debt, default or miscarriage of another person" (2 N. Y. Rev. St., 135, §2). This would not be a promise to answer for the *debt* of another, be-

cause Dresser at the time of the alleged promise was not a debtor but a bailee. It would, however, be a promise to answer for his *default* or *miscarriage* (Browne on the Statute of Frauds, 5th ed., §155). The practice of whittling down the Statute ceased long ago (White *vs.* Rintoul, 108 N. Y., 222; Browne, §§212, 214*a*). The cases cited by the learned court below are regarded by it as in point only because of unwarranted assumption, without averment or proof, that the firm made an original contract, upon consideration of assets received through the use of these securities.

Claimant argued below that, as under the New York Code practice, it was necessary for us to plead the statute. But the law is well settled to the contrary. (May *v.* Sloan, 101 U. S., 231; Dunphy *v.* Ryan, 116 U. S., 491; Reed on the Statute of Frauds, §521).

(*d*) Assuming, however, that there was a valid contract by the firm to guarantee to the claimant her husband's liability as bailee of her bonds and stocks, still she can not claim as a firm creditor.

It will be noticed that Mrs. Dresser does not claim any contract to have been made *with her.* She merely sues upon an alleged assumption of this liability, made in an alleged contract between Daniel Le Roy Dresser of the first part and Dresser & Co. of the second part.

This contract she says she knew of and consented to; but she does not claim to have been a party to it.

Her right to recover upon it, therefore, arises upon the equitable principle of *subrogation.*

The theory was fully set forth in the opinion of Mr. Justice Gray in the leading case of Keller *v.* Ashford, 133 U. S., 610, 622-6, and in the New Jersey case so extensively quoted in that opinion; and is illustrated also by Johns *v.* Wilson, 180 U. S., 440, 447; Sayward *v.* Dexter Horton & Co., 72 Fed. Rep., 758; Goodyear Co. *v.* Dancel, 119 Fed. Rep., 692, 695; Green *v.* Turner, 80 Fed Rep., 41, 43. The doctrine is clearly stated by Judge Thayer in Knapp *v.* Conn. Mutual Life Insurance Co., 85 Fed. Rep., 329, 331-2 (C. C. A.), where, after showing the general rule to be that the right of the third party to sue in the analogous case of the assumption of a mortgage debt by a grantee of real property is founded upon the fact that "the mortgagor, with respect to his grantee, is merely a surety for its payment," he proceeds as follows:

> "Such being the relation existing between the mortgagor and his grantee it is held that the mortgagee may be *subrogated to the rights of the mortgagor*, and, by a suit in equity for that purpose, may compel the grantee to keep his enagagement with the mortgagor by paying the mortgage debt. But as the right which the mortgagee thus acquires by virtue of the agreement of a third party with the mortgagor to pay the mortgage debt is purely equitable, and does not rest on privity of contract, it will not be enforced, if, for any reason, the contract between the mortgagor and his grantee could not be enforced by the former in a suit at law. *If reasons exist which would enable the grantee to successfully defend an action brought by the mortgagor for nonpayment of the mortgage debt, the same reasons will preclude the mortgagee from en-*

forcing his equitable right'' (citing authorities).

The point decided in the New Jersey case above referred to (Crowell *v.* Currier, 27 N. J., Eq. 152, 154, 156; s. c. *Id.*, 650, 652-6), the able opinion of the Vice Chancellor in which was unanimously affirmed by the Court of Errors and Appeals after argument by leading counsel, was that the mortgagee can no longer sue upon a covenant of assumption after the covenantor has reconveyed to the mortgagor, since the mortgagee can then no longer himself sue upon it. The principle is also succinctly and clearly stated by Chief Justice Gray in Coffin *v.* Adams, 131 Mass., 133. It is said by this court in Episcopal City Mission *v.* Brown, 158 U. S., 222, 227, and Willard *v.* Wood, 164 U. S., 502, 521, that the mortgagee has only the rights of the mortgagor in such a case, and therefore can assert only such cause of action, legal or equitable, as the mortgagor might possess.

Applying to the case at bar the doctrine thus stated, which seems to be a necessary corollary to the proposition that the original creditor's right is based upon the principle of subrogation, we find that Dresser could not have sued his firm upon this alleged assumption agreement. Whatever may have been the state of things when the bankrupt firm was formed and the assumption agreement is averred to have been made, the situation at the time of the bankruptcy was that these securities were all being used by him for his individual purposes. He could not have claimed against the firm.

It is therefore respectfully and confidently submitted that his wife is in the same position, and

that whatever claim she may have had, when (if ever) her securities stood pledged for loans whose proceeds were being used by the firm, had lapsed.

It is true that the transaction occurred in the State of New York, and that the rule in the cases above cited was disavowed in that State in Gifford *v.* Corrigan, 117 N. Y., 257, 264 (Danforth and Peckham, JJ., dissenting), a decision since followed in the State (New York Life Insurance Company *v.* Aitkin, 125 N. Y., 660, 670). This result was reached by substantially abandoning the doctrine of equitable subrogation, although that doctrine is recognized in a long line of New York cases as the basis of the right to sue (Burr *v.* Beers, 24 N. Y., 178, 179; Garnsey *v.* Rogers, 47 N. Y., 233, 237; Vrooman *v.* Turner, 69 N. Y., 280, 282; Pardee *v.* Treat, 82 N. Y., 385, 292; Wager *v.* Link, 134 N. Y., 122, 126), and although the court had recognized the right to sue as a "derivative" one, under which the party suing has no higher right than that of the promisee in the assumption agreement (Dunning *v.* Leavitt, 85 N. Y., 30, 35).

The case at bar does not affect the title to or any lien upon New York real estate. It is averred as arising upon an ordinary commercial contract. It is a case therefore in which it is open to the Federal courts to enforce their own views of the law (Swift *v.* Tyson, 16 Pet., 1, and cases following it). Nor is the question one as to the form of remedy. It is a question of substantial right.

It is respectfully submitted that the rule generally prevailing in other States and in the Federal courts, and not the present New York rule, is the one which is correct and should be adopted.

Even were this otherwise, however, and were Mrs. Presser's claim still existent, it is a deriva-

tive one even upon the New York theory. She stands in her husband's shoes, and it follows that she is postponed to the creditors of the firm; for it is well settled that her husband could not have claimed in competition with firm creditors, even though he had contributed the securities to the capital of the partnership or used them for its benefit (2 Lindley on Partnership, 721-2; Matter of Rieser, 19 Hun, 202, aff'd 81 N. Y., 629; Wallerstein *v.* Ervin, 112 Fed. Rep. 124, C. C. A.; Goldthwaite *v.* Janney, 102 Ala., 431, 439).

The position of the claimant comes down to this:

She lent certain securities to her husband for the purpose of borrowing money on them. She believes some of them were used by his prior firm. The securities or their proceeds came into the hands of her husband on the dissolution of the old firm. They remained in his possession and the securities are now pledged for his individual debts.

She has thus paid part of his debts with her securities, but now, although standing at best in the shoes of his individual creditors, she seeks to come in among firm creditors.

It may be suggested that this question would not necessarily arise upon allowance of the claim, but only upon application of the claimant thereafter for a dividend; but it was decided in the present form of proceeding in the Wallerstein case, *supra*, and the Referee has held it to be involved upon the present appeal (Matter of Dresser & Co., 14 Am. B. R. at p. 42).

III.

The claim thus ranks as an individual claim against Daniel LeRoy Dresser, and therefore cannot be proved as against the partnership estate.

As it has not been offered against the individual estate, and the time for presenting claims has expired, we might possibly take the point that it cannot be presented at all; but, as we understand it to be a valid claim as against the lady's husband, we would not oppose a provision in a judgment of reversal to the effect that the claim may be amended so as to be presented against the proper party, or permitting the proof in analogy with § 57 *n*, if the court deems itself to have jurisdiction to so direct.

It is respectfully submitted that the decree should be reversed and the claim dismissed.

GEORGE H. GILMAN,
Of Counsel for Appellant.

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Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States

ON APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

OCTOBER TERM, 1905.

NO. 180.

EDWARD B. WHITNEY, as Trustee in Bankruptcy of Dresser & Co.,

Appellant,

against

EMMA B. DRESSER,

Appellee.

BRIEF FOR APPELLEE.

ADRIAN H. JOLINE,
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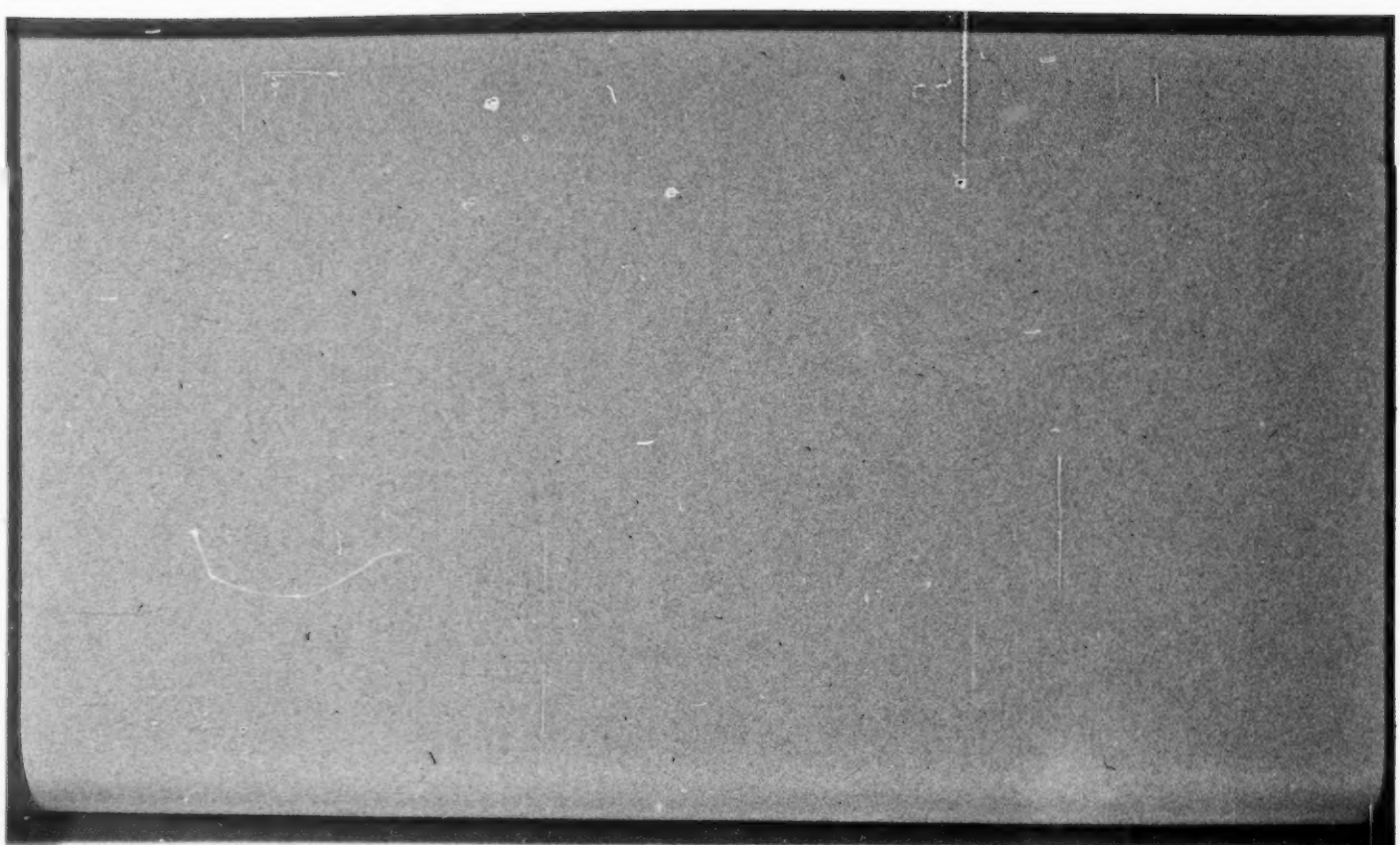

Supreme Court of the United States.

OCTOBER TERM, 1905.

EDWARD B. WHITNEY, as Trustee in Bankruptcy of DANIEL LE ROY DRESSER and CHARLES E. REISS, individually and as members of the firm of DRESSER & Co., Bankrupts, Appellant, against EMMA B. DRESSER, Claimant, Appellee.	No. 180.

BRIEF FOR APPELLEE.

Statement.

This is an appeal from a decree of the United States Circuit Court of Appeals, Second Circuit (*Record, p. 26*), affirming an order of the District Court of the United States for the Southern District of New York (*Record, p. 18*), entered and filed herein April 4th, 1904, affirming the decision of the Referee dismissing the trustee's objections to the appellee's claim against the bankrupt's estates (*Record, pp. 17-18*).

A proof of claim of the appellee (*Record, pp. 1-2*), was duly filed August 26th, 1903, and on January 21, 1904, the trustee filed objections to the allowance of the claim (*Record, pp. 5-6*). On March 3, 1904, claimant filed an amended proof of claim (*Record, pp. 2, 3, 4*). No objections were filed to the amended proof of claim, nor were the trustee's objections, already filed, amended. The trustee elected to have the filed objections apply to the amended proof of claim, and it was so understood by all parties.

On March 7th, 1904, a hearing on the trustee's objections was had, and testimony offered on behalf of the trustee (*Record, pp. 7-17*). At the close of the testimony a motion to dismiss the objections and allow the claim was granted by the Referee (*Record, p. 11*), from whom the trustee obtained a certificate (*Record, pp. 17-18*). The ground of the Referee's decision, as set forth in his certificate is as follows:

> The verified amended proof of claim filed by claimant is, on its face, *prima facie* proof of the indebtedness of Dresser & Co. to claimant and the testimony taken herein is insufficient to rebut such proof (*Record, p. 18*).

An appeal from the decision of the Referee was taken by the trustee to the United States District Court for the Southern District of New York. The Referee's decision was affirmed and an order to that effect entered April 4th, 1904 (*Record, p. 18*). From this order the trustee appealed to the United States Circuit Court for the Second Circuit. The order of the District Court was unanimously affirmed and an opinion filed January 9th, 1905 (*Record, pp. 21-25*). From the decree entered thereon January 19, 1905 (*Record, p. 26*), and on

the certificate of one of the Justices of this Court (*Record, p. 26*), made pursuant to Sec. 25, b. Sub. 2, of the National Bankruptcy Act of 1898, the trustee appeals to this Court.

The appellant's assignments of error substantially assert:

That claimant's amended proof of claim (*Record, pp. 2-5*) is insufficient on its face.

That the filing of the trustee's objections raises an issue as to which the burden of proof is on the claimant.

That, assuming the burden of proof to be on the objector, sufficient evidence has been offered by the trustee to warrant a disallowance of the claim (*Record, p. 27*).

POINTS.

FIRST POINT.—The amended proof of claim shows on its face an indebtedness of Dresser & Company.

The amended proof of claim (*pp. 2-5*) states in unequivocal language that "Daniel Le Roy Dresser and Charles E. Reiss, *composing the firm of Dresser & Co.*, * * * were and still are justly and truly *indebted to deponent* in the sum of $88,145;" then follows a statement of the consideration for the indebtedness. This statement contains many allegations that are unnecessary and evidentiary in character, but its terms are very clear and require no comment.

For some inexplicable reason the trustee has chosen to consider both the original proof of claim

filed August 26, 1903 (*pp. 1-2*), and the amended proof of claim, filed March 3, 1904, together. He points out that the first proof of claim contains an allegation (set forth in the statement of the consideration) that claimant, "at the request of Daniel Le Roy Dresser, turned over to him" certain securities, which securities, as "deponent is informed and believes," * * * "were deposited as collateral for loans, the proceeds of which loans were turned over to the firm of Dresser & Co. * * * and used by said firm."

Assuming that for some reason the well-established rule that the amended proof of claim supersedes the proof of claim first filed is not applicable to the present case, and that the original proof of claim is a matter for consideration under the Referee's certificate, it is submitted that there is nothing contained in the proof of claim filed August 26, 1903, that is inconsistent with the allegation of Dresser & Co.'s indebtedness to claimant.

The original proof of claim reads as follows:

> "*That Daniel Le Roy Dresser and Charles E. Reiss, composing the firm of Dresser & Co.*, the persons against whom a petition for adjudication in bankruptcy has been filed, at and before the filing of said petition, *were and still are justly and truly indebted to said deponent*," etc.

Then follows this allegation:

> "The consideration of said debt is as follows:
>
> "At the request of the now bankrupt Daniel Le Roy Dresser deponent turned over to him the following securities, owned by her, to be deposited as collateral for loans, or for other purposes" (here follows a list of the securities).

The latter statement, immediately following the

allegation contained in the first paragraph of the proof of claim is susceptible of but one interpretation, viz.: That Daniel Le Roy Dresser borrowed, *as a member of the firm of Dresser & Company*, the securties from the claimant, *for firm purposes alone*. If this were not so, the entire proof of claim would mean nothing, unless it be shown that the second statement did not in any way refer to the first. Such a contention, however, could not be seriously urged. After the allegation that Dresser & Company were indebted to the claimant in the sum of $156,530 the first proof of claim continues: "*the consideration of said debt* is as follows"; then follows the second statement. It is submitted that no closer connection between the two statements could be made than by the words used.

The appellant takes exception to the statement in the opinion of the Court below, referring to the amended proof of claim, that "the bankrupts took them (the securities), obtained money thereon which they used in their business, and agreed to return them to the claimant." It is submitted that this statement is a fair interpretation of the amended proof of claim.

There is nothing inconsistent between the statement that Dresser & Co. is indebted to claimant, and the allegation contained in the first proof of claim that the securties were turned over to Daniel Le Roy Dresser and deposited by him as collateral for loans, the proceeds of which were used by the firm. It is submitted that if the securities were turned over to a messenger of the firm, the liability of the firm would be just as great as if a meeting of the firm's members had been called, and the securities turned over in their presence. In any case, the fact remains (and it is so

stated in the proof of claim first filed) that it was a loan of the securities directly to the firm, and the manner of turning them over or the channel through which they found their way to the firm is immaterial. Except for the amount, the amended proof of claim is merely an unnecessary elaboration of that first filed, showing the channels through which the securities passed.

The appellant contends that claimant's "right to recover * * * arises upon the equitable principle of subrogation."

The following is then assumed as a fact (*Brief, p. 23*): "Mrs. Dresser does not claim any contract to have been made *with her*. She merely sues upon an alleged assumption of this liability, made in an alleged contract between Daniel Le Roy Dresser of the first part and Dresser & Co. of the second part."

A reading of the amended proof of claim is sufficient to show this statement to be an erroneous conclusion. The allegations clearly show a substitution of debtors—a complete novation. There was a promise of Dresser & Co. *to the claimant*—not to Dresser—to return the securities. In consideration of this promise claimant forbore making any demand for a return thereof, but on the other hand permitted Dresser & Co. to take over the securities, or the beneficial use thereof.

The claimant is not claiming through Dresser, but directly on the obligation of Dresser & Co. to return the securities.

In this connection attention should be called to the following unwarranted statement contained in the respondent's "Statement of the Case" (near

the top of page 3 of his brief), and relating to the proof of claim first filed:

"The original claim was that she had loaned her husband certain securities," etc. There is nothing in the record which warrants this statement as one of fact.

As is pointed out in the opinion of the lower court (*Record, p.* 24), there is a clerical omission in the allegation of the amended proof of claim, concerning the turning over to the bankrupts of the money derived from the loans made on claimant's securities.

The words contained in one of the paragraphs of the amended proof of claim (*Record, middle p.* 3) are not repeated in the second succeeding paragraph (*Record, near bottom, p.* 3). The omission occurs immediately before the words: "and used by said firm in its business." The words omitted are: "and the proceeds of the loans for which said securities had been deposited by said firm as collateral were turned over to said firm of Dresser & Co."

The presence or absence of these words is, however, immaterial. Such an allegation, evidentiary in character, while proper, is unnecessary.

It is singular to find the trustee insisting that this omission is fatal, and in the same point urging that the notion that a firm estate becomes liable if money is borrowed for its benefit is "erroneous but popular" (*sic*).

SECOND POINT.—The burden of proof having been assumed by the trustee, the question of where it rested is not one with which the Court is concerned on this appeal.

This point was not made in the Court below, but had it been urged, this view would probably have been adopted (see second paragraph of opinion of Cox, J., *Record*, *p.* 23).

Nowhere in the record of the trial of the objections before the Referee does it appear that the trustee regarded the burden of proof as being upon the claimant. The trustee did not except to any ruling of the Referee on this point; in fact, an examination of the minutes shows that no ruling was made nor was the question even raised. The learned Circuit Court of Appeals remark in their decision (*Record*, *bottom p.* 22) that "the trustee assumed the burden and introduced evidence"; the Record shows clearly that that is exactly what occurred.

THIRD POINT.—In any event the verified amended proof of claim constituted prima facie proof of the indebtedness of Dresser & Co., and the burden of proof was on the trustee to rebut the presumption thus raised.

If this Court is of the opinion that the question of where the burden of proof rested is before it

on this appeal, then, it is submitted, the burden was on the objector.

That the verified amended proof of claim is *prima facie* evidence of indebtedness requiring the trustee to produce evidence of sufficient force to rebut the presumption thus raised, is a proposition well established and squarely decided by THOMAS, D. J., in *Re Sumner*, 101 Fed. Rep., 224.

The following is an extract from the opinion:

> "Just here arises the second inquiry: If objection be made to the claim, must the claimant present evidence in addition to the statement provided for in Sections 57*a* and 57*b*, or has he made such a *prima facie* case as to place the burden upon the objector of furnishing evidence that shall overcome the evidence conveyed to the Court by the statement? It is apparent that, if the statement makes a *prima facie* case, the claimant may rest, and await the introduction of evidence that shall be opposed to the sufficient evidence presented by the claimant. * * *
>
> "It is apparent from subdivision '*f*' that the statute contemplates that, after the claimant has presented his claim in the prescribed manner, objection may be made, and that thereafter the question of the objection shall be taken up and decided. This does not mean that the burden of proof is upon the objector to disprove the claim, but that he shall produce evidence whose probative force shall be equal to, or greater than, the evidence offered in the first instance by the claimant. The burden of proof is always upon the claimant, but the statute points out how he may meet it for the purpose of making a *prima facie* case; and further provides that a creditor, or other person entitled, may, by interposing objection, so relate himself to the record as to be able to give evidence in opposition to the claim. Therefore, if the

> creditor shall have complied with Section 57*a*, by filing with the referee a statement under oath, he shall be entitled to have his claim accepted, unless from some circumstance the referee demands further evidence from him, or unless an objection is interposed, and such objection is followed by evidence offered by the objector, *which shall overthrow the presumptive case made by the claimant.*"

In *Re Shaw*, 109 Fed. Rep., 780 (E. D. Pennsylvania), the trustee filed an objection to the allowance of a claim upon the ground that claimant had been given a preference by the bankrupt within four months of the filing of the petition.

J. B. McPherson, D. J.:

> "What was the effect of this objection? Certainly to suspend the allowance of the claim until the matter could be further inquired into; *the burden of proof being upon the objector.*"

The trustee then proved the preference by the bankrupt to the claimant, but the claimant alo testified that the preference had been surrendered; claimant's right to urge his claim was therefore revived, and the Court held that the claim should be allowed without any further proof than the verified proof of claim.

In *Re Doty*, 5 Am. B. R., 58 S. W. Dexter, Referee, states the rule as follows:

> "In the ordinary case, objection is usually made at the first meeting of creditors, *before* the claim is actually allowed or during the pendency of said meeting. The referee thereupon proceeds to hear the evidence offered by the objecting creditor, *who has to sustain the burden of proof.* The claimant lawfully rests upon the *prima facie* statement presented by his sworn claim" (citing *In Re Sumner, supra*).

In Re Cannon, 133 Fed., 837, the District Court or the Eastern District of Pennsylvania says in its pinion (p. 838): "The burden is on the trustee objector) to overcome the *prima facies* of the for- al proof."

In Re Carter, 138 Fed., 846 (District Court for ie Western District of Arkansas), squarely holds iat, where a claimant against a bankrupt's estate resents its claim in proper form, duly verified, ich claim constitutes a *prima facie* case in favor the claimant, and the burden of proof is there- on shifted to the objector.

It is submitted that the opinion of the Circuit ourt of Appeals in this case (*Record, pp. 21-25*) lso reported in 135 Fed., 495), contains a correct tement of the law.

So far as the decision in *Re Wooten* (cited by pellant) is concerned, it is sufficient to say that ne of the many peculiar and suspicious facts ich there appeared, are present in this case.

The appellant also cites *In Re Domenig, 128 Fed.* . The sole question in that case was whether Pennsylvania statute providing that a wife may t sue her husband, except for divorce or for re- very of her separate property after his desertion, events her from proving a claim against his estate bankruptcy; and the Court held that it did not.

The appellant, all through his brief, and in his tatement of Facts," refers to the claimant as the e of one of the bankrupts, and dwells on the picion that should be attached to everything this y has done or said. In fact, on page 18 of his f, he charges her with perjury. It seems to us y strange that the appellant should be so ready throw the cloak of suspicion and falsity over claim, and make the grave charge that he does, n on page 5 of his brief he concedes that the

amount mentioned in the proof of claim is due claimant, and on page 28 admits that the claim is a just one as against Dresser's estate.

It will also be noticed in this connection that nowhere is this question raised by the trustee's objections. What is more, there is nothing in the record to show that claimant was, at the time of the filing of the petition, the wife of one of the bankrupts, or even a married woman. The only reference to any such relation is the testimony of the trustee's witness Northrop (*Record, top p.* 11) that he "*understands* her *to be* the wife of D. LeRoy Dresser"; the date of the hearing was March 7, 1904.

The appellee's only reason for calling attention to this matter is that it does not seem proper to inject matter into this appeal which has no place here, and which is not included in the trustee's objections, nor in his assignments of error, nor in the record.

The appellant, in his brief, refers to a decision of McPherson, D. J., in *Re Shaw*, 112 Fed. Rep., 947, upon the identical claim referred to in the same Judge's opinion reported in 109 Fed. Rep. (*supra*). It is submitted that a mere perusal of that decision is sufficient to point out the difference between the facts of that and those of the present case. A discussion of what that difference is seems unnecessary.

The appellant, in attempting to draw an analogy between State insolvency laws and the Bankruptcy Act, cites *Matter of Jesclson*, 10 Daly, 104, for the proposition that under the former laws the burden of proof is upon the creditor. The appellee does not think any light can be thrown on the questions involved in this appeal by a discussion of State

insolvency laws, but desires to call attention to the fact that in the Jeselson case the *assignor* objected to the allowance of the claim; he denied that he owed the creditor the amount of his claim; nor was the claim mentioned in the schedule of the assignor. None of these facts appears in the present case. If the trustee had introduced evidence to the same effect here the Referee might well have held that he had overcome the presumption raised by the amended proof of claim and shifted the burden of proof to the claimant.

In *Bank v. Lenahan*, 66 Md., 461, referred to by appellant, a secured creditor (a bank) had filed an affidavit setting forth a judgment for the gross amount of the loan to the assignee, and the nature of the collateral pledged to secure the loan. The creditor contended that it was entitled to dividends on the gross amount and all that the Court decided was that the affidavit, on its face, did not warrant any such conclusion, as it was not shown that the bank had not collected part of the judgment.

The Court say (*p. 469*): "According to this rule (filing of claimant's oath) it was necessary for the bank to file an affidavit showing that it had not received any portion of the sums for which the judgments "were rendered, except such as were credited."

The final result reached in the Maryland case (that the amount realized by the sale of collateral, should, for the purpose of declaring dividends, be deducted from the amount of the loan), is squarely opposed to the doctrine of the New York Courts (*People v. Remington*, 45 Hun, 329, aff'd., 121 N. Y., 675); further illustrating the futility of attempting to draw an analogy between the Bankruptcy Act and the State Insolvency Laws.

The appellant also refers to the practice under the Bankruptcy Act of 1867, and cites *In re Northern Iron Company*, 14 N. B. R., 356 (E. D. Mich.) That case merely held that where, at the holding of an election for assignee, doubtful claims are presented by the officers of the bankrupt corporation, the Register should subject them to a close scrutiny; and if the claims are not susceptible of ready and demonstrable explanation, a case of suspicion should be deemed to exist. Such was found to be the case, and the claims were *postponed* until after the election of the assignee. The evident purpose of the filing of the claims was to control sufficient votes to elect one of the officers assignee; a mere perusal of the claims (*p. 357*) is sufficient to understand their suspicious character. The decision went no further of course than to sustain the Register in his refusal to accept claimants' votes on the election of an assignee, or, to use the appellant's remark with reference to the decision of Judge Lowell in *Re Saunders*, 2 Low. 444, was "made upon the preliminary hearing for the purpose of deciding who was entitled to vote for assignee."

The opinion of Judge Lowell in *Re Bartusch*, 9 N. B. R., 478, does not in any way modify his opinion in *Re Saunders* (*supra*). In the former case he says:

> "He (Register) must, of course, decide upon each debt separately, and *upon evidence which satisfies him that there is a judicial doubt of its validity* or of the right of the creditor to prove it" (italics are ours).

The case of *Re Knoepfel*, 1 Ben., 398, referred to in appellant's brief, merely holds that where it appears *by the proof of claim* that the debt is evi-

denced by a promissory note, the latter should be produced upon request.

In *Matter of Jaycox*, 7 N. B. R., 303, the proofs of claim were not in the form prescribed by the Act of 1867, nor did they contain the allegations required by the Statute.

The practice under the Bankruptcy Act of 1867, on the trial of objections to a claim, is clearly set forth in *Re Felter*, 7 Fed. Rep., 904, and in *Re Saunders* (*supra*).

The opinion in the latter case is as follows (*p.* 447):

> "I am of the opinion that the holder of a note overdue, making due affidavit as required by the Statute, makes out his *prima facie* case, subject to the discretion of the Register and Court to order further proof, and to the right of any creditor or person interested to offer counter proof."

The rule as laid down in the opinion of the Court in the Felter case is as follows:

> "A creditor's claim, duly proved according to the provisions of the bankrupt act, is, *prima facie*, good. The burden of showing that the claim is founded in mistake or fraud lies upon the assignee or the creditor attacking the proof."

In Subdivision *C* of Point II of his brief, the appellant takes the same position that he did in the Court below, and urges that the Statute of Frauds is a bar to appellee's claim, although no such objection had been raised by the trustee before the argument in the Circuit Court of Appeals, nor does the record present any such question.

The appellant contends that, as no written promise of Dresser & Co. is annexed to the proof of claim, it must be presumed that the promise was oral. Why such a presumption? Why not a presumption the other way? For if the contention of the defendant, that a promise of this kind should be in writing is correct, then, following defendant's reasoning, should it not be presumed to be in writing, since it would be of no effect if verbal?

There is no proof whether this promise is or is not in writing, but the trustee could easily have made proof by calling either member of the firm of Dresser & Co. or the claimant.

On this point the Lower Court very properly say in their opinion:

> "*Non constat* the writing which the appellant considers necessary may be in the possession of the claimant to be produced when an issue is presented requiring its production (*Record, bottom p. 23*).

But assuming that all transactions on and after May 1, 1897, between Dresser & Co., and the claimant (see Amended Proof of Claim, *Record, p. 3*) were oral, how would they fall within the statute?

Dresser & Reiss, co-partners, composing the firm of Dresser & Co., succeeded to the business of D. Le Roy Dresser, taking over *all* assets (including, necessarily, claimant's securities, or the moneys loaned thereon), and assuming all liabilities, including that for a return of claimant's securities. In other words, they received claimant's securities, with the privilege of borrowing money thereon; and they were, therefore, under obligation to return the securities. There was then a *new consideration*, which fact alone sufficiently establishes that the so-called "promise," securing,

as it does, a benefit to the promiser, is not within the statute. (*First National Bank of Sing Sing vs. Chalmers*, 144 N. Y., 432; *Wales vs. Stout*, 115 N. Y., 638; see, also, *Ackley vs. Parmenter*, 98 N. Y., 425).

Dresser & Co. assumed, with deponent's knowledge and consent, the obligation of D. Le Roy Dresser; there was, therefore, a discharge of the original obligation and the substitution of a new debtor; these are sufficient to make a verbal promise valid (*Booth vs. Eighmie*, 60 N. Y., 238; *Wyman vs. Smith*, 4 Super. Ct. (2 Sandf.), 331; *N. Y. & Erie Co. vs. Gilchrist*, 16 How. Pr., 564; *Olmstead vs. Greenly*, 18 Johns, 12; *May vs. National Bank of Malone*, 9 Hun, 108; jt. affd. 73 N. Y., 599; *First National Bank vs. Chalmers*, 120 N. Y., 658; *Meriden Britannia Co. vs. Zingsen*, 48 N. Y., 247; *Rudel vs. McMorran*, 17 Weekly Dig., 258).

FOURTH POINT.—The evidence introduced by the trustee is insufficient to rebut the presumption raised by the verified amended proof of claim.

The appellant refers to an "'erroneous but popular notion,' that the firm estate becomes liable if money is borrowed by an individual partner upon his own credit for the benefit of the firm." It does not appear that any useful purpose would be served by discussing an academic question on this appeal.

The testimony of the witnesses called by the trustee merely tends to show that certain banks loaned money on part of claimant's securities, tak-

ing the note of D. Le Roy Dresser, and in some cases turning over to Dresser a check drawn to his order. If anything, this testimony supports claimant's allegations.

The claimant here is not one of the banks with which claimant's securities were deposited, but the owner of collateral loaned to the bankrupt firm.

It is submitted that the claimant is not concerned with the manner of obtaining loans by Dresser & Co. or its predecessors, upon her securities. Claimant distinctly alleges that in 1896 she loaned the firm of Dresser & Goodrich the use of the securities, and that at the time of the formation of Dresser & Co., the latter firm, at their request and with her consent, received the use of said securities and assumed the liability for a return thereof.

The check of the United States Mortgage and Trust Company (Exhibit D, *Record, p. 17*) illustrates the fallacy of the trustee's reasoning, for the endorsement appearing on the check clearly shows that the money borrowed was received and deposited by Dresser & Co.

All of the allegations contained in claimant's proof of claim remain uncontradicted and unaffected by the testimony of the trustee's witnesses, and the trustee having rested, the granting of claimant's motion to dismiss the objections and allow the claim, was proper.

FIFTH POINT.—The decree of the Circuit Court of Appeals, affirming the order of the District Court, affirming the decision of the Referee that the trustee's objections be dismissed and the claim allowed, should be affirmed with costs.

The appellant observes that "as the time for presenting claims has expired, we might possibly take the point that it cannot be presented at all;" and that "we would not oppose a provision in a judgment of reversal to the effect that the claim may be amended so as to be presented against the proper party."

The fact that only one side has rested, and that this is an appeal from the granting of the motion to dismiss the objections at the close of the trustee's case, seems to be overlooked.

It is respectfully submitted that in event of reversal, the entire case will be reopened and an opportunity given to claimant to introduce testimony.

ADRIAN H. JOLINE,
ADRIAN H. LARKIN,
GEORGE E. HARGRAVE,
Of Counsel for Appellee.

OPINION

Supreme Court of the United States.

No. 180.—October Term, 1905.

Edward B. Whitney, as Trustee in Bankruptcy of Dresser & Co., Appellant, vs. Emma B. Dresser.	Appeal from the United States Circuit Court of Appeals for the Second Circuit.

[February 19, 1906.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an appeal from the allowance of a claim of Emma B. Dresser against the firm of Dresser & Company, bankrupts, the members of the firm being Daniel Le Roy Dresser and Charles E. Reiss. The allegations of the amended proof, so far as necessary to be stated, are that the bankrupts are justly and truly indebted to the deponent in the sum of $88,145, upon the following consideration. Before May, 1896, the deponent lent certain specified shares of stock to the firm of Dresser and Goodrich for the purpose of the firm's borrowing money upon the same, &c., and the firm did so. In May, 1896, the firm was dissolved, Daniel Le Roy Dresser took over its assets and assumed its liabilities, including that to the deponent with her consent, "and the proceeds of the loans for which said securities had been deposited by said firm as collateral were turned over to said Daniel Le Roy Dresser and used by him in his business." In May, 1897, the present bankrupts formed their partnership, taking over the assets and assuming the liabilities of said Dresser. At the request of said Dresser and Reiss with deponent's knowledge and consent the liability of Dresser to the deponent was assumed by the firm, "and used by said firm in its business." Evidently some words were omitted at this point, by mistake, and we agree with the Court below that the most reasonable view is that it was intended to repeat the phrase quoted above in speaking of the transfer from Dresser & Goodrich to Dresser.

The trustee objected to the allowance of the claim against the assets of the partnership and put in evidence before the referee, the main fact proved being that Dresser personally signed the notes on which were made the advances for which the stocks were pledged. This was relied on, in connection with the form of the proof of claim before it was amended, to show that the stocks really were lent to Daniel Le Roy Dresser alone. On the other hand it appeared that some, at least, of the checks for the money lent went to the firm, and all the evidence was reconcilable with the

averments of the amended claim. The referee ruled that the verified amended proof of claim was *prima facie* proof of the indebtedness of Dresser & Co. to the claimants, held the evidence introduced insufficient to rebut it, and dismissed the objection. The District Judge sustained the action of the referee and his order was affirmed by the Circuit Court of Appeals. *In re Dresser*, 135 Fed. Rep. 495. 68 C. C. A. 207.

It is urged that the claim is bad on its face because it showed at most a promise to answer for the debt of another, required to be in writing by the New York Statute of Frauds, and no such writing was filed with the proof in accordance with the requirement of the Bankruptcy Law. § 57 *b*. It is unnecessary to consider whether the objection is open or otherwise sound, because, if it is, which we are far from intimating, the claim clearly imports a novation, that is to say, the giving and accepting of the responsibility of the present firm in place of that of Daniel Leroy Dresser alone. The only question warranting the appeal is whether the sworn proof of claim is *prima facie* evidence of its allegations in case it is objected to. It is not a question of the burden of proof in a technical sense—a burden which does not change whatever the state of the evidence—but simply whether the sworn proof is evidence at all.

The Circuit Court of Appeals observed that the proof of claim warrants the payment of a dividend in the absence of objection, and, therefore, must have some probative force. In reply it is argued that what is done in default of opposition is no test of what is evidence when opposition is made; that a judgment may be entered on a declaration for want of an answer, yet a declaration is not evidence; that it is contrary to analogy to give effect to an *ex parte* affidavit, and that on general principles it is the right of any party against whom a claim is made to have it proved, not only upon oath, but subject to cross-examination.

Notwithstanding these forcible considerations we agree with the Circuit Court of Appeals. The prevailing opinion, not only in the Second Circuit, but elsewhere seems to have been that way. *In re Sumner*, 101 Fed. Rep. 224. *In re Shaw*, 109 Fed. Rep. 780. *In re Cannon*, 133 Fed. Rep. 837. *In re Carter*, 138 Fed. Rep. 846. *In re Doty*, 5 Am. B. R. 58. See also *In re Saunders*, 2 Low. 444, 446. *In re Felter*, 7 Fed. Rep. 904, 906. The alternative would be that the mere interposition of an objection by any party in interest, § 57 *d*, would require the claimant to produce evidence. For if the formal proof is no evidence a denial of the claim must have that effect. If it does not, then the formal proof is some evidence even when there is testimony on the other side. The words of the statute suggest, if they do not distinctly import, that the objector is to go forward, and thus that the formal proof is evidence even when put in issue. The words are: "Objections to claims shall be heard and determined as soon" &c. § 57 *f*. It is the objection, not the claim, which is pointed out for hearing and deter-

mination. This indicates that the claim is regarded as having a certain standing already established by the oath. Some force also may be allowed to the word "proof" as used in the act. Convenience undoubtedly is on the side of this view. Bankruptcy proceedings are more summary than ordinary suits. Judges of practical experience have pointed out the expense, embarrassments and delay which would be caused if a formal objection necessarily should put a creditor to the production of evidence or require a continuance. Justice is secured by the power to continue the consideration of a claim whenever it appears there is good reason for it. We believe that the understanding of the profession, the words of the act and convenient and just administration all are on the side of treating a sworn proof of claim as some evidence even when it is denied.

Order affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.